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DECISIONS

OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JUNE, 1898, TO DECEMBER, 1898.

VOLUME XXVII

Edited by S. V. PROUDFIT.

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Government Publications

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1899.

DEPARTMENT OF THE INTERIOR,
Washington, D. C.

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Volume 1, from July, 1881, to June, 1883	$1.05
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DECISIONS

RELATING TO

THE PUBLIC LANDS.

JURISDICTION—MINING CLAIM—AGRICULTURAL ENTRY.

ASPEN CONSOLIDATED MINING CO. *v.* WILLIAMS.

When it clearly appears that in a departmental decision material facts have been overlooked or misstated therein, that evidence has been given consideration which on its face it was not entitled to receive, or that other and prejudicial mistakes have been made, it is the duty of the Secretary of the Interior, whether he is the same person who decided the case originally, or his successor in office, to reopen said case and correct such manifest error, if the government still retains the legal title.

The allowance of an entry on final proof, regularly submitted, in which the character of the land is duly shown, determines such matter by a higher quality of evidence than that afforded by a surveyor's return, and thereafter anyone attacking such entry must assume the burden of establishing such illegality or irregularity in the procurement or allowance of the entry as will defeat the issuance of patent thereon.

An agricultural entry of land returned as of the character subject to such entry, and shown to be such by the final proof, is not affected by a subsequent survey in which the land is returned as mineral in character.

Where in granting an application for a hearing the Commissioner of the General Land Office expressly places the burden of proof upon one of the parties, that direction is binding upon the local office, and they can not depart therefrom in the absence of a modification thereof by the Commissioner.

The right and title of a purchaser under the pre-emption law is not affected by the discovery of mineral subsequent to the date of his entry and final certificate; such right and title must be determined by the known character of the land at the time of the entry, hence, evidence of a discovery subsequent thereto, is not admissible in support of a charge that the land is not subject to agricultural entry.

The return of the surveyor-general as to the character of land constitutes but a small element of consideration when the question as to the true character of the land is at issue.

The former departmental decision herein of July 7, 1896, 23 L. D., 34, withdrawn and vacated.

Secretary Bliss to the Commissioner of the General Land Office, June 3, 1898. (W. C. P.)

December 4, 1882, John R. Williams filed pre-emption declaratory statement for the NE. ¼ of the NE. ¼ Sec. 12, T. 10 S., R. 85 W., and the

W. ½ of the NW. ¼ and the NW. ¼ of the SW. ¼ of Sec. 7, T. 10 S., R. 84 W., 6th p. m., Leadville, Colorado, land district, alleging settlement April 12, 1881, which declaratory statement was amended November 25, 1884, to describe the S. ½ of the NW. ¼, the NE. ¼ of the SW. ¼ and the NW. ¼ of the SE. ¼ of Sec. 7, T. 10 S., R. 84 W. Williams' original settlement and subsequent occupancy and residence covered the land in the amended description, but by mistake an erroneous description had been given in his declaratory statement and hence the amendment was allowed but, as is usual in such cases, was made subject to any prior valid adverse claim.

February 11, 1885, Williams submitted final proof of his compliance with the pre-emption law showing, among other things, his settlement, improvement, cultivation, and continuous residence upon the land, and also showing its non-mineral character, which proof was found satisfactory by the local officers and was approved by them. He then made payment for the land and the local officers allowed his pre-emption cash entry and issued a final certificate to him. Notice of Williams' intention to make such final proof had been regularly given for a period of thirty days by publication in a newspaper and by posting in the local office, as required by act of March 3, 1879 (20 Stat., 472), the notices stating the description of the land to be entered, the names of the witnesses by whom the necessary facts would be established and the time and place of making the proof. No objection of any character was made to such final proof or cash entry on behalf of the placer claims hereinafter mentioned or otherwise.

March 4, 1891, the Aspen Consolidated Mining Company filed in the local office a written protest, verified by one of its agents, asserting ownership of three placer mining claims, known as the Fowler, the Field, and the Lux, alleged to have been located in May 1883, and to cover portions of the land embraced in Williams' entry. This protest objected to the issuance of patent to Williams for the reasons:

1st. That the aforesaid tract is not agricultural but placer mining ground.

2nd. That the said tract was not taken up (as deponent verily believes) by said John R. Williams in good faith for agricultural purposes but in fraud of the pre-emption laws of the United States for speculative purposes.

The protest concludes with the following prayer:

Wherefore deponent respectfully prays that a hearing be ordered to allow them to prove the foregoing allegations and protect their legal rights to the aforesaid Lux, Fowler and Field placer mining claims, and also to show cause why the said agri. C. E. No. 21 should be canceled.

January 23, 1892, your office ordered a hearing upon this protest to determine whether the land in conflict was known at or before the date of said cash entry to be valuable for placer mining. This order placed the burden of proof upon the mining company, as will appear from the following extract therefrom:

The land having been returned as agricultural, and the cash entry having been allowed, the burden of proof is upon the attacking party.

A hearing was had at which a large mass of testimony was submitted, and, August 25, 1893, the local officers rendered a decision adverse to the mining company, holding:

> We believe from the evidence that the Fowler, Field and Lux placers have no value whatever for placer mining purposes. We further believe that the land embraced in P. E. cash entry No. 21 of John R. Williams is very valuable for agricultural purposes, and that he settled thereon in good faith for the purpose of making a home for himself and family under the pre-emption laws.

Then after a review of the history of the case and the testimony submitted relating to the mineral character of the land, they say:

> In view of the foregoing, we find that the land in controversy was not on February 11, 1885, or prior thereto, of any value for placer mining purpose; that it has no value present or prospective for such purposes, but that on the contrary it is valuable for agricultural purposes.

Upon appeal to your office, the decision of the local officers was affirmed May 21, 1894.

Upon appeal to this Department it was held by Secretary Smith, July 7, 1896 (23 L. D., 34), that the burden of proof to show the mineral character of the land was erroneously placed upon the mining company; that rightly placed the burden of proof rested upon Williams to show its non-mineral character; and that measuring the evidence with the burden of proof thus readjusted, the land was shown to be of known mineral character at the date of Williams' entry. It was then directed that Williams' entry be canceled to the extent of the land in conflict. Notice of this decision was served July 15, 1896, and a motion for review thereof filed by Williams August 14, 1896, was denied by Secretary Smith, August 28, 1896. Secretary Smith's term of office terminated by resignation September 1, 1896, and notice of the denial of the motion for review was served upon Williams September 4, 1896.

September 9, 1896, the mining company made payment at the local office for the land in conflict, mineral entry thereof was allowed, and final receipt issued.

September 29, 1896, Williams filed in the Department a petition, saying:

> The Commissioner directed the local officers that "the land having been returned as agricultural and the cash entry having been allowed, the burden of proof is upon the attacking party." Your petitioner submits that both parties to this cause went to trial under those requirements and that the conduct of the trial and the character of the evidence submitted by your petitioner were in conformity with such requirements.
>
> * * * * * * *
>
> Your petitioner respectfully submits that his property rights should not be prejudiced on account of his following said instructions, if such instructions were erroneous. Having followed the instructions of the officers of the government your petitioner submits that he should lose nothing unless required by the absolute demands of the law, and your petitioner respectfully submits that there is no such absolute demand present in this case.

After referring to the belief expressed in Secretary Smith's decision,

supra, that when bed rock is reached valuable auriferous deposits will be found, the petition proceeds:

> Your petitioner represents that as soon as he became aware of the fact that the burden of proof was upon him to show the non-existence of valuable auriferous deposits at bed rock . . . . he caused a careful examination to be made of said land by numerous persons. Your petitioner now submits the following newly discovered evidence showing the absolute non-existence of gold at bed rock.

Accompanying the petition are the affidavits of seven different persons to the effect that an examination made since Secretary Smith's decision, discloses that there is no gold at bed rock.

Williams' petition then urges that if the burden of proof to show the non-mineral character of the land had been placed upon him in the first instance, his preparation for the trial, the manner of conducting the same, and the proof upon his part would necessarily have been quite different from what they were with the burden of proof placed upon the contesting mineral claimant by the prior explicit direction of the General Land Office. It is also contended therein that inasmuch as the mineral claimant did not attempt, by direct testimony, to show the actual existence of gold at bed-rock, the defendant was not called upon to submit testimony upon that point.

On the presentation of this petition, further proceedings under Secretary Smith's decision were, by direction of Secretary Francis, suspended during the consideration thereof.

January 15, 1897, the mining company filed a petition asking that the mineral entry of the land in conflict, made September 9, 1896, be passed to patent, and that Williams' petition be dismissed: (1) because the evidence proposed to be submitted is not newly discovered inasmuch as it might have been submitted at the former hearing, if due diligence had been exercised; (2) because the departmental decision in question was a final adjudication of the questions in controversy, it being alleged that the decision of one Secretary is binding upon his successor.

May 6, 1897, the mining company filed four affidavits re-asserting the mineral character of the land, setting forth evidence thereof alleged to be newly discovered, and attacking the credibility of persons whose affidavits were filed with Williams' petition.

After due notice to both parties an extended oral argument was heard, both parties participating, during which not only the points directly involved in each of these petitions, but also the merits of the case were fully discussed, the point most strongly urged by the mining company being that the present Secretary of the Interior is without jurisdiction or authority to take any action in the premises, except to execute the decision heretofore rendered by Secretary Smith.

Thereafter and on September 2, 1897, the mining company while again protesting that the former decision is binding upon the present Secretary, filed a copy of a newspaper purporting to give a report of a recent discovery of gold bearing veins or lodes on Difficult Creek, a

few miles from the land in conflict. Accompanying said newspaper the company filed a motion in which, referring to the newspaper report, it said:

We are aware that this report is not primary evidence, nor is it always possible that primary evidence can be obtained in practicing before the department, there being no means by which witnesses can be compelled to testify, but we repectfully ask that said evidence be considered.

In a letter dated December 20, 1897, counsel for the mining company, referring to the said newspaper report, say:

It is understood that one of the counsel for the Aspen Consolidated Mining Company, signing this communication, (Mr. De Lan,) has been requested by the Honorable, The Assistant Attorney General for the Interior Department, to advise the Department in writing what action the company desired in respect to statement filed relative to the discoveries of gold in Difficult Creek;—whether it desired that a rehearing of the case should be ordered, and, if ordered, whether it was its desire that the hearing should be limited to the specific question of said discoveries.

In response to this verbal request of the Assistant Attorney General, counsel for the Aspen Consolidated Mining Company beg leave to say:

First. That it is not the desire of the company that a rehearing of said cause be ordered for any purpose whatsoever; but that upon the contrary, said company reiterates its claim that the decisions of Secretary Smith are final and should not be disturbed. . . .

Second. That it does not desire, or request, a rehearing of the pending cause, either as a whole or with limitations, for the purpose of investigating the alleged discoveries of gold upon Difficult Creek.

The questions discussed in the oral and written arguments and arising upon the record will be considered in their appropriate order.

1. JURISDICTION OF PRESENT SECRETARY.

The question as to when the jurisdiction and authority of the land department, of which the Secretary of the Interior is the head, over proceedings for the acquisition of public lands ceases and terminates, has been the subject of both judicial and departmental investigation. In Moore *v.* Robbins (96 U. S., 530), it was said:

While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public lands, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent had been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. . . . With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed.

In United States *v.* Schurz (102 U. S., 378, 395, 402), it was said:

The constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To

them as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

* * * * * * *

From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away.

This case (page 401) also speaks of a decision as final when it is "made and recorded in the shape of the patent."

In Smelting Co. *v.* Kemp (104 U. S., 636, 640), the court said:

The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with.

In New Orleans *v.* Paine (147 U. S., 261, 266), in ruling upon the finality of decisions of the land department, the court says:

Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.

In Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589, 592), which quotes with approval the foregoing language from New Orleans *v.* Paine, *supra*, it is said:

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land

department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. Strother *v.* Lucas, 12 Pet. 410, 454; Grignon's Lessee *v.* Astor, 2 How. 319; Chouteau *v.* Eckhart, 2 How. 344, 372; Glasgow *v.* Hortiz, 1 Black, 595; Langdeau *v.* Hanes, 21 Wall., 521; Ryan *v.* Carter, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat., 2449; Frasher *v.* O'Connor, 115 U. S., 102; but whenever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, Bagnell *v.* Broderick, 13 Pet., 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

It is, of course, not pretended that when equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. Cornelius *v.* Kessel, 128 U. S., 456; Orchard *v.* Alexander, 157 U. S., 372, 383; Parsons *v.* Venzke, 164 U. S., 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. . . . After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings.

In Beley *v.* Napthaly (169 U. S., 353, 364), it is said:

The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office.

Then referring to United States *v.* Stone (2 Wall., 525), and Noble *v.* Union River Logging R. R. Co. (147 U. S., 165), two of the cases relied upon here by the mining company, the court said:

The case of United States *v.* Stone, 2 Wall., 525, has no bearing adverse to this proposition. In that case it was stated that a patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially; that if he issues a patent for land reserved from sale by law, such patent is void for want of authority, but that one officer of the land office is not competent to cancel or annul the act of his predecessor; that is a judicial act and requires the judgment of a court. The power to cancel or annul in that case meant the power to annul a patent issued by a predecessor, and this court held no such power existed. The officer originally issuing it would have had no greater power to annul the patent than had his successor.

Neither does Noble *v.* Union River Logging Railroad, 147 U. S., 165, touch the case. The principle therein decided was in substance the same as in the Stone case, *supra*. The control of the department necessarily ceased the moment the title passed from the government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map as provided for in the act of Congress under which the proceedings were taken by the company, the first section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted.

The following provisions in the Revised Statutes of the United States

have reference to the authority of the Secretary of the Interior over proceedings for the disposition of public lands:

SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * * * * *

Second. The public lands, including mines.

* * * * * * *

SEC. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all agents grants of land under the authority of the government.

SEC. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title public lands not otherwise specially provided for.

In Knight *v.* United States Land Association (142 U. S., 161, 177, 178, 181), in construing these statutory provisions and in discussing the jurisdiction and power of the Secretary of the Interior over proceedings for the disposition of public lands, the court said:

The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.

* * * * * * *

The rules prescribed are designed to facilitate the department in the dispatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul.

* * * * * * *

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government which is a party in interest in every case involving the survey and disposal of the public lands.

In Williams *v.* United States (138 U. S., 514, 524), it is said:

It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that

superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

Adequate jurisdiction and authority to prevent such a miscarriage of proceedings for the disposition of public lands, as would result from the issuance of a patent to one not entitled thereto, when another has by compliance with the public land laws fully earned the right to receive such patent, is certainly lodged in either the land department or the courts. That the courts are without such jurisdiction while the legal title remains in the United States is settled by many decisions of the supreme court, among which are United States *v.* Schurz, *supra*, and Michigan Land and Lumber Co. *v.* Rust, *supra*. A suit by the United States at the present time against either Williams or the mining company to recover the legal title to the land in controversy, can not be maintained because the government can not recover a title which it still retains and because one can not be compelled to restore a title which he has not received and does not possess. A suit at this time to determine whether Williams or the mining company has acquired an equitable title to the land would be equally unsuccessful for the reason that the authority of the land department over proceedings to acquire title to public lands is exclusive while the legal title remains in the United States, and that authority extends to determining whether or not an equitable title has passed. Michigan Land and Lumber Co. *v.* Rust, *supra*. If the contention of the mining company is correct, it necessarily follows that during the period intervening between the decision of Secretary Smith and the issuance of a patent, there is a hiatus in which such jurisdiction does not exist anywhere, and that the land department must issue a patent under Secretary Smith's decision even though it clearly appears by the records and proceedings in that department that this decision makes an obvious mistake and does manifest injustice in that it directs a patent to be given to one not entitled thereto and to be withheld from one who has lawfully and fully earned the right to its issuance. A contention which leads to such an anomalous and unreasonable result is believed to be without support in the statutes or judicial decisions.

Gage *v.* Atwater (21 L. D., 211), is a case wherein Secretary Smith reviewed and re-opened a decision of a preceding Secretary. Gage made desert land entry of certain lands in California and subsequently this entry was contested by Atwater and others. By successive appeals the case reached the Secretary of the Interior where a decision was made August 1, 1892, by First Assistant Secretary Chandler, rejecting Gage's final proof and directing the cancellation of his desert land entry (15 L. D., 130). A motion by Gage for a review of this decision was denied by Secretary Noble, March 3, 1893 (16 L. D., 247). After the decision in their favor, the contestants made homestead entries of portions of the land, and the matter again came before the Secretary of the Interior upon Gage's application for a re-review of the former

decision. Secretary Smith upon consideration thereof re-opened the case saying (21 L. D., 211, 218):

This case is one of difficulty. I recognize the necessity for the observance of the rules intended to fix definite limits within which litigation must cease, but I can not lose sight of the fact that it is even more important that it should not cease until substantial justice is meted out to the parties.

The doctrines of *stare decisis* and *res adjudicata* have additional weight and import where new interests have sprung up and new parties have intervened. In this case the subject matter of litigation is the same, and the parties are still the same.

From a review of the whole case, I am impressed with the conviction that a just conclusion has not yet been reached. In its present status, justice to all parties, it seems to me, will be secured by re-opening said cases to await final action upon Gage's final proof heretofore offered.

Osborne *et al. v.* Knight (22 L. D., 459; 23 L. D., 216), is a case wherein Secretary Smith reviewed and reversed a decision by Secretary Noble (adhered to on motion for review), denying Knight's application as a *bona fide* purchaser under section 5 of the act of March 3, 1887 (24 Stat., 566), and sustaining the protest of Osborne and other homestead settlers against such application. Upon the decision in Wisconsin Central R. R. Co. *v.* Forsyth (159 U. S., 46), in a similar case, Knight filed a motion for a re-review of the former decision, and in passing upon this motion Secretary Smith said (22 L. D., 461):

He did all that was necessary to protect him in his rights, and the fact that he was erroneously denied such right, and others allowed to make entry of the lands applied for, can not be successfully pleaded as a sufficient reason to prevent the reconsideration of the matter and the reinstatement of Knight's application, the lands still being within the jurisdiction of this Department.

Wood *v.* Wood (24 L. D., 177) is a case wherein Secretary Smith rendered a decision between two contesting claimants for a tract of land in Florida and subsequently denied a motion for review thereof. Upon a petition for re-review, Secretary Francis caused the case to be re-examined and reversed the decision of Secretary Smith for the reason that an obvious mistake had been made therein in overlooking and failing to consider matters of fact clearly established by the evidence and questions of law affecting a correct and just decision.

In Parcher *v.* Gillen (26 L. D., 34, 42), the Department held:

The true rule drawn from an examination of all of the authorities is that the jurisdiction of the land department ceases where the jurisdiction of the court commences, viz., when the legal title passes, and that there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law and protect both public and private rights.

The office of the Secretary of the Interior is a continuing one. Its incumbents come and go but the office remains. The powers and duties of the office are impersonal, and operate uniformly at all times and upon all controversies without reference to who may be exercising those powers or performing those duties. A change in the person holding the office does not authorize, and should not invite, a review or reversal of prior rulings or decisions; and neither does such change prevent or defeat a review or reversal in any instance where the Secretary making the ruling or rendering the decision, if still in office, would be in duty bound to review and

reverse his own act. Administrative reasons as well as the principles of common justice require that a secretary should not disturb or reverse prior rulings or decisions, except where it is affirmatively shown that manifest injustice has been done or the law clearly misapplied; but this is equally true of his own rulings and decisions, and is not limited to those of his predecessor.

So long as the legal title remains in the government the Secretary of the Interior, whoever he may be, is charged with the duty of seeing that the land is disposed of only according to law. The issuance of a patent is the final act and decision in that disposition and with it and not before does the supervisory power and duty of the Secretary cease.

See also Moores *v.* Sommers (23 L. D., 514); Mullen *v.* Porter (25 L. D., 444) and Cagle *v.* Mendenhall (26 L. D., 177).

Where the evidence is such that reasonable minds may fairly draw different conclusions therefrom, of course such difference will not justify the reversal of a former decision, yet when it clearly appears that material facts have been overlooked or misstated therein, that evidence has been given consideration to which on its face it is not entitled, and that other prejudicial mistakes have been made, it is the duty of the Secretary of the Interior, whether he be the same person who decided the case originally or some other person, to re-open it and correct such manifest error, if the government still retains the legal title. Cases may arise where the acquiescence or some act of estoppel of the defeated claimant or a due consideration of the rights of innocent parties acquired on the faith of the former decision, will prevent such action, but nothing of that nature has come into this case. The parties remain the same and the one complaining of the former decision has taken timely and decisive action to have the alleged wrong corrected.

A careful examination of the record, made to determine what action should be taken upon the pending petitions presented by the parties respectively, as hereinbefore recited, disclosed mistakes and errors in the former decision which demanded a re-examination and reconsideration of the whole case, which has been had and the result of which will now be given.

II. BURDEN OF PROOF.

The facts bearing upon this question, some of which have been hereinbefore stated, are:

1. The exterior lines of township 10 S., R. 85 W., were surveyed in 1880. Township 10 S., R. 84 W., was surveyed in 1881 and the approved plat thereof was filed in the local office July 19, 1882. The east line of T. 10 S., R. 85 W., being the west line of T. 10 S., R. 84 W., was included in the survey of the exterior lines of T. 10 S., R. 85 W., and was therefore not included in the survey of T. 10 S., R. 84 W. Section 7, T. 10 S., R. 84 W., embraces the land in controversy and its west line is the line separating these two townships. The field notes of these surveys return the land along the west line of this section as "level, soil first rate, bunch grass" (Field Notes, Colorado, Vol. 86, p. 414, Gen'l Land Office), and along its north, east and south lines as "mountainous, soil

3rd rate" (Field Notes, Colorado, Vol. 98. pp. 127–129, Gen'l Land Office). This is a non-mineral return and in the nomenclature of the land department is usually designated as an "agricultural" return to distinguish it from a "mineral" return. The west line of this section is the only one which touches the land in controversy and in fact is the only one which touches the Williams entry. The decision under review says: "the land in said township 10 S., range 84 W., was returned by the surveyor-general as 'rocky and mountainous' and the soil in and around section 7 in said township as 'third rate,'" but it overlooks the fact that the land along the west line of the township was returned as "level, soil first rate, bunch grass" and that this is the only line coming in contact with either the land in dispute or the Williams entry. These surveys were in force when Williams filed his pre-emption declaratory statement and February 11, 1885, when he made entry and purchase, but September 16, 1886, they were suspended by your office on account of irregularities in their making respecting which it is not suggested or claimed that Williams had any knowledge or connection.

2. March 4, 1891, the mining company's protest against the issuance of patent to Williams was filed in the local office, alleging ownership of the placer claims in question; that the land in the Williams entry "is not agricultural but placer mining ground" and that the same was taken up by Williams "in fraud of the pre-emption laws of the United States for speculative purposes," and containing this prayer:

> Wherefore deponent respectfully prays that a hearing be ordered to allow them to prove the foregoing allegations and protect their legal rights to the aforesaid Lux, Fowler and Field placer mining claims, and also to show cause why the said agri. C. E. No. 21 should be canceled.

Upon consideration of this protest your office by letter of January 23, 1892, to the local officers, ordered a hearing upon said protest and expressly placed the burden of proof on the mining company, saying:

> The land having been returned as agricultural, and the cash entry having been allowed, the burden of proof is upon the attacking party.

3. In 1891 a survey of the "claims filed and settled upon prior to September 18, 1886," in T. 10 S., R. 84 W., was made by deputy surveyor Edward S. Snell, and the approved plat thereof was filed in the local office February 8, 1892. In a report, or general description, accompanying the return of this survey, the lands in the valley of the Roaring Fork, including that now in controversy, are stated to be of a deep alluvial loam susceptible of producing heavy crops of all vegetables and cereals, with irrigation, and to be valuable for placer mining and rich in placer gold.

4. At the hearing in the local office, beginning March 20, 1893, which resulted in a finding and decision against the mining company, the parties proceeded according to the direction of your office, which placed the burden of proof upon the mining company, and no objection was made thereto except upon argument of a motion to dismiss at the con-

clusion of the mining company's evidence and again upon argument after all of the evidence had been submitted. No complaint of the direction respecting the burden of proof had been made to your office nor had any modification thereof been requested.

The former departmental decision held that by reason of the suspension of the surveys in force at the date of Williams' entry and purchase, and by reason of the mineral return in the Snell survey, in force at the time of the hearing, the local office should have placed upon Williams the burden of proving the non-mineral character of the land and should not have cast upon the mining company the burden of proving its mineral character. That decision overlooked the fact that the mining company had in its protest prayed permission to prove its allegation of the placer mining character of the land and to show cause why Williams' agricultural entry should be canceled, thereby inviting the burden of proof, and also overlooked the fact that your office in granting the hearing had directed that the company take the burden of proof. That decision further stated that "at the hearing the burden of proof was placed upon the company against its protest" when the record contains no suggestion of any objection by the company to taking the burden of proof until after the submission of its evidence and again in its written argument after the introduction of all of the evidence.

There are three reasons why the ruling in the former decision is wrong, any of which is in itself sufficient:

First. In compliance with existing statutes and regulations and after due notice of his intention to submit final proof, Williams proved to the satisfaction of the local officers, by the oaths of himself and witnesses, that the land was not mineral in character, and upon this his entry and purchase were allowed and certificate issued to him. When final proof, including a proper showing as to the character of the land, has been regularly submitted to the local officers and approved by them and entry allowed and certificate issued, the character of the land is established by a higher quality of evidence than that afforded by the surveyor's return, and by this finding or decision of one of the constituted branches of the land department the entryman acquires such an equitable right or title as will put upon one attacking that entry the onus of proving such illegality or irregularity in the procurement or allowance thereof as will avoid or prevent the issuance of a patent thereon.

Second. Williams' entry and purchase in 1885 were not affected by Snell's survey six or seven years thereafter. However much it may be contended that one making entry or purchase of public land is charged with knowledge of the *prima facie* or presumptive character given thereto by an existing survey, it can not with reason or justice be held that he must anticipate subsequent surveys giving a different character to the land, nor that he will be required to again prove his

right thereto, because years thereafter in the course of making a succeeding survey another surveyor is led to an opinion different from that entertained by the first surveyor. The difference of opinion in some cases might be due to the development of the mineral character of the land after the entry and purchase, and clearly the right and title obtained thereby would not be affected by such subsequent discovery.

Third. The burden of proof having been expressly placed upon the company by the order of your office granting the hearing and no modification thereof having been sought by the company the local officers were bound by that order and there should have been no subsequent re-adjusting of the burden of proof.

In Quigley *v.* State of California (24 L. D., 507), a case involving a similar question, it was held:

> Your office having by express direction placed the burden of proof upon the mineral claimant, the local office was bound by that direction and was not authorized to change or ignore it. If that direction was erroneous the error was not committed in the local office.
>
> The hearing was ordered at the request of the mineral claimant and he was fully advised of the action of your office in placing the burden of proof upon him. If, for any reason, he believed this was erroneous, he should have applied to your office for a modification of its order in this respect.

State of Washington *v.* McBride (25 L. D., 167, 181), presented a like question and it was there said:

> In the departmental decision of March 17, 1894, *supra*, it was held, as before shown, that the burden of proof was on the State and it was directed that the second hearing proceed on that line. Without now affirming or disaffirming this holding, it is sufficient to say that it thereby became the law of the case for your office and the local office. The State made no effort to obtain from the Department a modification of the decision in this particular, and it was not competent for your office, or the local office, to make a modification thereof or to depart therefrom.

United States *v.* California and Oregon Land Company (148 U. S., 31), is a case which on a former appeal had been remanded by the supreme court to the circuit court with stated directions for further proceedings, and when the case again came before the supreme court the United States alleged error on the part of the circuit court in following some of the directions given in remanding the cause. Referring to its former decision and to this contention, the supreme court said (p. 38):

> That decision was the law of this case for the subsequent proceedings in that court . . . . If the government was not satisfied with the decision, it should have called our attention to it, and have sought a modification or enlargement of the decree.

III. DISCOVERY OF MINERAL SUBSEQUENT TO ENTRY AND PURCHASE.

The greater portion of the evidence produced at the hearing related to alleged prospecting, development and discovery of mineral subsequent to Williams' entry and purchase, and the former departmental decision shows that it was in large part based upon and controlled by this evidence. This was manifestly erroneous and was in direct opposi-

tion to repeated rulings of the Department and of the Supreme Court of the United States. This evidence was introduced and considered over the repeated objection of Williams and in violation of the order of your office granting the hearing which defined the issue to be tried to be:

whether that portion of said placer claims in conflict with said entry was known at or prior to date of such cash entry, February 11, 1885, to be valuable for placer mining.

In this connection reference should be had to section 2258 Revised Statutes, excepting from pre-emption sale "lands on which are situated any known salines or mines" and sections 2318, 2319 Revised Statutes, reserving from other disposition public lands *valuable* for minerals, otherwise spoken of as containing *valuable* mineral deposits, and declaring the same open to occupation and purchase under the mining laws.

In Deffeback *v.* Hawke (115 U. S., 392, 404), referring to these sections and kindred statutes, the court said:

It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri, and Kansas. We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is 'valuable mineral deposits' which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that 'lands valuable for minerals' shall be reserved from sale, except as otherwise expressly directed, and that 'valuable mineral deposits' in lands belonging to the United States shall be free and open to exploration and purchase. We also say that lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the preemption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

In Colorado Coal and Iron Co. *v.* United States (123 U. S. 307, 328), it was held:

A change in the conditions occurred subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, can not affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines' capable of

being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the preemption act can not be successfully assailed.

Section 2333, Revised Statutes, relating to placer mining claims excepts from placer patents all veins or lodes known to exist within the boundaries of the placer claim which are not, as known veins or lodes, included in the application for placer patent and paid for as lode ground, and further provides that "where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof." In passing upon the effect of a discovery of veins or lodes in a placer claim subsequent to the application for patent, the court said in United States *v.* Iron Silver Mining Co. (128 U. S., 673, 683):

Lodes and veins in quartz or other rock in place, bearing gold or silver or other metal, were not disclosed when the application for the patent was made. The subsequent discovery of lodes upon the ground, and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time.

To the same effect see Iron Silver Mining Co. *v.* Mike and Starr Co. (143 U. S., 394, 401); Sullivan *v.* Iron Silver Mining Co. (143 U. S., 431, 434); Cripple Creek Gold Mining Co. *v.* Mt. Rosa Mining, Milling and Land Co. (26 L. D., 622, 624).

While recognizing the authority of the land department to cancel an entry and withhold patent where the conditions existing at or prior to the date of the entry justify such action, it has been uniformly held by the supreme court that where an entry and final certificate are obtained by compliance with the public land laws the right of the entryman or purchaser to a patent is complete, that his right or title will not be impaired by any delay in issuing the patent, and that when issued the patent will relate back to the date of the entry or purchase and give effect thereto from that time. It will be sufficient to refer to a few of these decisions.

In Carroll *v.* Safford (3 How., 441, 461), it was said:

Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase-money, and issued a patent certificate, can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust.

In Witherspoon *v.* Duncan (4 Wall., 210, 218, 220), the court held:

In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act.

According to the well-known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title.

* * * * * * *

It does not appear from the record why the patent was so long delayed; but the claim was finally approved on the original proof, and the patent, when issued, related back to the original entry.

In Stark *v.* Starrs (6 Wall., 402, 418), the court said:

The right to a patent once vested is treated by the government, when dealing with the public lands, equivalent to a patent issued. When in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut of intervening claimants.

See also Amador Medean Gold Mining Co. *v.* South Spring Hill Gold Mining Co. (13 Sawyer, 523; 36 Fed. Rep., 668).

Excepting the decision now under reconsideration, the departmental decisions have with entire uniformity held that the right and title of a purchaser or entryman are not affected by discovery of mineral subsequent to the completion of his purchase or entry.

In Nicholas Abercrombie (6 L. D., 393), it was held (syllabus):

To constitute the exemption contemplated by the preemption law under the head of 'known mines,' there should be upon the land, at the time of sale, ascertained coal deposits of such extent and value as to make the land more valuable to be worked for the coal, under the conditions then existing than for agricultural purposes.

A change of condition occurring after sale whereby new discoveries are made, or by means whereof it may become profitable to work the land for its coal, cannot affect the title as it passed at the time of the sale.

In James K. Jacks *et al.* (7 L. D., 570), it was said:

The evidence fails to show that at the date of said homestead and cash entries any coal had been discovered upon said land, and the subsequent discovery of coal, on a small portion of the land, after the final entry, can not affect the right of the purchaser, who had completed his entry.

In Harnish *v.* Wallace (13 L. D., 108), it was held, in passing upon a preemption entry:

In order to defeat the entry, on the ground of mineral character of the land, it must be shown that mineral was known to exist at the time of the entry, and a discovery of mineral made, as in this case, more than four years after the allowance of the entry, will not warrant its cancellation.

In Arthur *v.* Earle (21 L.D., 92), it was said:

At any rate, the discovery, having been made after the purchase of said land and the issuance of final certificate to Earle, would not defeat the issuance of patent, even though said land should have been shown to be more valuable for coal than for agricultural purposes, as the conditions existing at the date of final entry determine whether the land should be excluded from homestead entry on account of its alleged mineral character.

To the same effect see Nancy Ann Caste (3 L. D., 169); Rea *et al.* *v.* Stephenson (15 L. D., 37); Jones *v.* Driver (15 L. D., 514); Chormicle *v.* Hiller (26 L. D., 9).

It being entirely clear under these authorities that the right and title of a purchaser under the pre-emption law will not be affected by the discovery of mineral subsequent to the date of his entry and final certificate, it necessarily follows that evidence of such subsequent discovery should not be received or considered.

IV. WAS THE LAND KNOWN TO BE MINERAL AT THE DATE OF WILLIAMS' ENTRY AND PURCHASE?

In considering the case upon its merits the logical course is to take up the evidence in the order in which it was submitted at the trial as nearly as possible. The mining company's evidence was submitted first.

Carl Spangler, president of the mining company, testifies that he first saw the land in 1889, four years after Williams' entry and purchase, when he spent a week investigating the placer claims. So far as his testimony relates to discoveries made after he became acquainted with the land it can not be considered. He states that no active mining operations have been carried on by the company for the reason that it was thought best to await the settlement of disputes as to title; that the surface of the land is nothing but rock, boulders and sand, unfit for agricultural purposes; and that the company has expended $29,000 on these placer claims in purchasing the property, and in securing title.

Wilson went to Aspen in the winter of 1884–5, and says that he does not consider the land agricultural. He first examined the ground in March, 1893, eight years after Williams' entry. Even if the discoveries claimed to have been made by him could be considered they would not tend very strongly to establish the claimed mineral character of the land, because he says of them: "I do not know that it would pay, I did not have time to examine it only very slightly on the surface, and to say that I know it would pay in dollars and cents,—I could not say that,—I can't answer that."

Calvin has lived in Aspen since the summer of 1884, and testifies that he does not consider the Williams claim agricultural land, because there is too much rock, boulders and gravel on it. He does not claim to have prospected these claims or to have made any discovery thereon before 1893, but saw parties at work, in 1885, below Castle Creek, a mile or more from the land in controversy.

Welch examined the land with Wilson and Calvin in 1893 and says that he does not consider it good for agricultural purposes.

A sack of dirt obtained by the witnesses Wilson, Calvin and Welch in 1893, while prospecting on the Fowler claim preparatory to testifying at the hearing in this case, is claimed to have contained from twenty to thirty colors of gold and received much attention in the former decision.

This claimed discovery made eight years after Williams' entry threw no light upon the known character of the ground in controversy at the time of that entry. This made its consideration a mistake. There is some question whether the dirt came from above or below the mouth of Castle Creek, but either place was over a mile from the land in controversy.

Harkins testifies that he has had considerable experience in placer mining; that ground to pay, by panning, would have to contain from $5.00 to $10.00 per cubic yard; by sluicing, fifty or twenty-five cents, according to the amount of water and dumping ground used; and, by hydraulics, ten cents per yard, after being fixed for the work. He knows nothing of the ground in contest; does not always consider ground as placer, because one can obtain colors, and says that no one can tell whether dirt will pay by looking at the gold in a pan, without weighing the results of panning by the yard or foot.

Fowler, one of the original locators of these claims, says he is a professional miner, having had many years' experience: and in accounting for the presence of placer gold upon this land says such gold will be washed for thousands of miles. He first went to Aspen in 1881: prospected along Roaring Fork river, and found gold, but not being in a position to make location, said nothing about his find, and did not locate until 1883. He selected the locations, because of the advantages offered for economical sluice or hydraulic mining. On cross-examination he testified that he worked on these claims on the flat ground, towards the lower end of the Fowler claim, which is not on the land in controversy, digging prospecting holes, two to six feet deep; and in 1883, 1884 and in 1885 attempted to sink to bedrock, in different places, but failed to reach it because of water and sand—the deepest of these shafts being fifteen feet; that above three thousand dollars were expended in these years; that he did not get any money out of the ground, and did not expect to by that work. He says he found sufficient indications of gold to justify the opinion that hydraulic mining on a large scale on these claims would give profitable results.

Krauss, assayer and chemist, testifies by deposition to prospecting and examining these placer claims in the fall of 1885, and gives the result of some tests then made, but all this was after Williams' entry.

Zahl, a jeweler, visited Aspen in 1891 to have some assessment work done upon these placer claims and says that he was then advised by the postmaster to stay away from the claims as Mrs. Helen Bird had asked the postmaster to notify Zahl that she would shoot him if he did not stay away. Mrs. Bird had no interest in the Williams entry, and no attempt was made to connect Williams with the hearsay threat. Mrs. Bird did have a separate contest of her own with the mining company. Zahl also made tests of samples taken from the land by Spangler long after the purchase by Williams.

Tippett did not examine or prospect the claims until the week pre-

vious to testifying and Martin never saw or prospected them until after Williams' entry.

The former decision places much reliance upon the reports of two deputy surveyors as sustaining the contention of the mining company. The verified certificate or report of Deputy Mineral Surveyor Marks, as to the expenditure in labor and improvements upon these placer claims, quoted from in the former decision, is dated November 24, 1891, and purports to describe mining developments found by him upon the claims shortly before that time; when the developments were placed there, whether before or after Williams' entry, is not stated; nor is it shown that any of them are upon the ground in controversy. Whatever may be said of other objections made to this certificate, or report, it was not admissible on the question whether the land in controversy was known to be mineral in character at the date of Williams' entry and purchase.

The report, or general description, accompanying the return of Deputy Surveyor Snell's survey in 1891, of certain lands in the valley of the Roaring Fork, is one of the reports relied upon in the former decision. An important part of that report is omitted from the long quotation therefrom in that decision and to show the relation of the part omitted to that quoted both are here reproduced, that omitted being inserted in italics. The report reads:

In the valleys is found a rich deep alluvial loam susceptible of producing heavy crops of all vegetables and cereals with irrigation. Practically all of the valley lands have been located and filed upon by people contemplating tilling the soil or with a view to secure lands fabulously rich and valuable for mineral, both placer and other deposits. . . . . Placer deposits were first discovered along the Roaring Fork in township ten . . . . in 1882, since which time mining interests have steadily advanced and numerous deposits of mineral both placer along the river, and veins in the mountains to the southwest, have been discovered and developed, till now these townships embrace a region of mining activity unparalleled in the State. Among the many developments and enterprises here, the project to wash the entire bed of the Roaring Fork River for a distance of several miles is especially worthy of note.

The river in its course through these placer grounds described in my notes, flows in a bed some eighty feet below the general level of the valley, and is within thirty feet of bed-rock as is shown by the extensive improvements on the placers, which however have been carried only to such an extent as to prove beyond a doubt the value of the mineral deposits embraced thereby. *That these lands are valuable for placer mining purposes, and rich in placer gold can not for a moment be doubted when it is considered that they lie immediately at the base of Aspen mountain one of the richest and largest mineral deposits in the world and which deposits are rapidly and easily decomposed, thereby precipitating the metal to be deposited along the beds of the streams. For ages this work has been going on till now the lower strata of sand and gravel along the streams in this region are rich in these metals.* I made a personal test of these strata in several places along the river, and was thereby convinced of the real worth of the land for the purpose claimed. I was advised that it was the intent of the company controlling these claims to put in a complete system of dams, flumes and pipes for hydraulic mining in the near future. The history and record of placer mining along California Gulch near Leadville, to which this case is analogous, will surely justify such an expenditure of money.

It is a well established fact, shown by the evidence, that the mineral

deposits of Aspen mountain, and those of Smuggler mountain which is also adjacent to the land in controversy, are silver and lead and that no gold has ever been found there, and yet Mr. Snell expresses the opinion that the mineral deposits of Aspen mountain have been decomposing and have been precipitated to the lands along the streams making them "rich in placer gold." When it is known that this supposed precipitation of decomposed Aspen mountain ores was considered by Mr. Snell as establishing his conclusion beyond doubt, confidence in that conclusion is weakened. This report is also weakened by the fact, as shown therein, that it was in part based upon information and advice received from the company controlling these placer claims. Aside from these inherent proofs of the unsatisfactory character of the report as evidence in an important controversy pending when the report was made, it can not be considered for the reason that it is not based upon the state of mining development, improvement and discovery existing at or prior to the time of Williams' entry and purchase in 1885, but upon conditions existing six years later.

The former decision gives more attention and greater effect to the reports of the surveyors than is warranted even when they are otherwise admissible as evidence. Section 2395, Revised Statutes, regulating the duty of surveyors in this respect, provides:

> Every surveyor shall note in his field book the true situation of all mines, salt licks, salt springs and mill seats, which come to his knowledge, all water courses over which the line he runs may pass, and also the quality of the lands.

In Winscott *v.* Northern Pacific R. R. Co. (17 L. D., 274, 276), in considering the effect of a surveyor's report, Secretary Smith said:

> These instructions to the surveyor relate only to his report of 'mines.' He may or may not report that the lands indicate that valuable minerals are hid beneath their surface. Such indications are not 'mines.' A report to that effect, not being required by the law, is optional with him. Being something beyond his required duty, no conclusion of law arises from it; it is merely a statement of the officer, more or less valuable according to his opportunities of observation, and ought not preclude the assertion of any right or the proof of the facts of the case as they really exist.
>
> It has been seen how limited are these opportunities of observation; the officer merely passing over the confines of the section, with his attention more directly absorbed by the duties of his scientific profession, and the necessity for absolute accuracy in his courses and distances. Even were he a geologist or mineralist, his opportunities of observation along the course of his lines would be the scantiest; and beyond those lines, or on either side of them, his duties do not carry, but prohibit, him from going. So that, practically, the interior of the section or that portion thereof not immediately along the line being run, is beyond the observation or knowledge of the surveyor, and his opinion in relation to the same can not be of much value.
>
> So that the report of the surveyor must necessarily constitute but a small element of consideration, when the question is as to the true character of the land.

In Barden *v.* Northern Pacific R. R. Co. (154 U. S., 288, 320), the court said:

> Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868

and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor-general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject.

The evidence on behalf of Williams was to the followingeffect:

Williams testifies that he went to Aspen first, in 1880, when there were less than 100 people there, and no mining being carried on; that he staked this land in the fall of 1880, and started a ditch; that he stayed in Aspen that winter, and early in the spring got out logs to build a cabin on the land; that his family came out from Pennsylvania, reaching the land June 8, 1881; and in that year, he built a cabin, took out two ditches for irrigating, cultivated a small patch of ground, and fenced four or five acres. Thereafter he continued to reside upon the land for the next two or three years, improving and cultivating it during the summer seasons, and moving into Aspen for the winter to send his children to school, leaving his household goods on the ranch. At the time of final proof he had improved the land by building a better dwelling house, stables, sheds and milk-house, and had forty or fifty acres fenced, including a part of the land in controversy, and more grubbed. He raised crops each year, which he disposed of, realizing good returns therefrom, and part of the time conducted a dairy. After final proof he made further improvements on the land, and increased the portion in cultivation. He also gives, with some detail, the amount and value of the crops raised each year. He states that he saw some work done on these placer claims in 1883 or 1884. This statement is referred to in the former decision as tending to show that the land was known to be mineral at the date of his entry; but that decision does not mention other statements made by Williams in the same connection. He says this work was done down on the Shirley ranch; that he understood that the work had been abandoned, and that he was not aware that the mineral claims conflicted with his entry until 1892 (the year in which your office ordered the hearing). The Shirley ranch is a mile distant from the Williams land and was included in the pre-emption entry of Albert Shirley as agricultural land in 1884, and patented to him as such in 1889.

Williams further states that he had been engaged in mining since 1879—about seven years of that time having been spent in prospecting for placers and mining them; that he, with four other men, prospected the Roaring Fork Valley in 1880, from Red Buttes up to Independence, covering the ground in controversy and found nothing to justify taking

it up as placer claims, and none of them took up a claim although it was all unoccupied ground then. He was cross-examined respecting the J. C. Johnson, Mollie Gibson, Smuggler, Schiller, Oro, Branch, Mint, Tenderfoot, Sunday, Alva Adams and Pride of Aspen mines, some located near Aspen, others near Ashcroft and others near Woody, but since they are all shown by the evidence to be silver lode mines the evidence relating to them is not of any assistance in determining whether the land in controversy was known to be valuable for gold placer mining at the date of Williams' purchase. Much is said in the former decision about these claims and especial reference is made to the great value of some of them at the time of the hearing in 1893, but the fact that they are silver lode claims and carry no gold seems to have been overlooked in that decision. Williams was also cross-examined about the Legal Tender, Mount Hope, Gavin and other mining claims, lode and placer, in the Independence district about eighteen miles above Aspen on the Roaring Fork. These are gold claims. The time of their discovery is left uncertain and their situation is too remote from the land in controversy to justify their consideration in determining its character.

Williams also stated that the Cowenhoven tunnel begins on the land in his entry, and runs through it for a distance of about one thousand feet; that he is interested in the tunnel but that it was built to drain Smuggler mountain and carry out ore and dirt and is a common carrier.

Lux, one of the original locators of these placer claims, testifies that he lived in Aspen twelve years; that in May or June, 1883, after the locations were made, he went on the claims with Fowler, who panned three or four pans, and found one color; that he refused to pay any more assessments, and sold out in September, 1883, for twenty-five dollars; that the land was not valuable for placer mining; that Williams cultivated his land in 1881, 1882, 1883, 1884 and 1885; and that it is good for agricultural purposes.

McClure testifies that he has been engaged in mining forty years, and in placer mining twenty-five years; that it would be difficult and expensive to work this ground even if it contained gold; that he heard of the placers when he first went to Aspen in 1882, and that he prospected the ground in 1883, and found nothing that would pay.

Atkinson testifies that he went to Aspen in 1880, and is a son of John Atkinson who took up a ranch adjoining Williams; that the land is agricultural; that Williams began his improvements in 1881, and continued his improvements and cultivation until after final proof, residing there during the time. He further states that he first heard talk of gold on these claims in 1883; and saw men working down on the Shirley ranch, but first heard that the placer claims extended up the river to the Williams land the year before the hearing. (The hearing was in 1893.) He was engaged in placer mining and prospecting from 1860 to 1877, and states that the land had no value for placer mining purposes.

Brunton testifies that he is general manager of the Cowenhoven tunnel; that it was not driven for mining purposes, but for drainage of silver mines on Smuggler mountain and to afford ventilation and cheap transportation of ores to the level of the railroad; that it was begun July 29, 1889—the site being purchased from Williams in the early part of that month.

Herrick testifies that he has lived in Aspen since 1879; has had ten years' experience in placer mining, that in 1879 he prospected from Independence down to Aspen, and found no gold; that in 1883, when he heard talk about placers there, he spent one day prospecting down by Hallam lake adjacent to the land in controversy, but found no gold.

McFarland testifies by deposition, that he knew of the Fowler claim in about 1882, but never heard of the Field or Lux until the hearing, although he had lived on the ground since 1880; that the Williams land is good for agricultural purposes; that in 1880 or 1881 he started to build a dam about where Cooper Avenue crosses Roaring Fork on the Lux claim; that he dug to the bed of the river, and panned a great deal of the dirt but never found any color; that he prospected the stream there, and twenty miles below in 1882, with an old Californian, and never found any gold.

Wellman testifies that he went to Aspen in 1880, and prospected there about six weeks for gold, with no results; that two men were doing some sluicing down by the Buttes, and he helped them clean up one Saturday; that they did not work any more, but afterwards Fowler commenced working there; that he (witness) was down there every day, and panned the dirt, but after they got through the gravel streak on top, about two feet, they never found a color.

The evidence concerning the marking of the placer claims upon the ground and the doing of the annual assessment work by the grantors of the mining company is conflicting, but in view of the other matters determined herein it will not be necessary to pass upon this conflict.

After his entry and purchase, at different times along up to the date of the hearing, Williams sold and conveyed portions of his entry including portions of the ground now in controversy, and at the time of the hearing much of the land sold and conveyed had been built upon and improved by purchasers, the improvements aggregating several hundred thousand dollars in value, and those upon the ground now in controversy including many dwelling houses, an electric power house and hospital grounds. There is some uncertainty as to the location of the placer boundaries, but the evidence seems to indicate that Williams' residence is also on the ground in controversy.

At the time of Williams' entry in 1885 the land in controversy was of but small value, but by reason of the subsequent growth and extension of the town of Aspen and the subsequent development of silver mining on Smuggler mountain and the subsequent construction of a railroad up the Roaring Fork valley and across a portion of the land in

controversy, it had, at the time of the institution of the mining company's contest in 1891, become of great value entirely independent of its claimed mineral character.

In this statement most of the evidence touching upon points about which there is no dispute, or upon which there is no serious dispute, has not been mentioned. These points may be stated as follows:

That the mining prosecuted at Aspen is lode-mining for silver and lead; that the fact that land is good for agricultural purposes does not preclude its containing placer deposits in paying quantities, or *vice versa;* that in placer mining the richest deposits are generally found at or near bedrock; that no mineral vein or lode of any kind has been found within the Williams entry; and that, even if all the evidence submitted respecting the discovery of mineral from 1881 to the time of the hearing in 1893, be considered, including the claimed discoveries subsequent to Williams' entry in 1885, not one dollar in gold has been taken from the placer claims in question, and no gold at all, except in the form of colors in prospecting.

After careful examination and consideration of the evidence the conclusion is reached that the mining company has wholly failed to sustain its allegation that the land in controversy was known to be valuable for placer mining at or before Williams' purchase, and that, on the other hand, Williams has proven by a large preponderance of the evidence that the prospecting and examination of the ground up to the time of his entry showed that it did not contain placer deposits of sufficient value to justify the expenditure of labor or money in their extraction.

Besides the direct evidence upon this point other facts tend to enforce and sustain this conclusion, such as: (1) Four years intervened between Fowler's claimed discovery and Williams' entry, which afforded ample opportunity for the development of the placer character of the land, and yet during that time no active placer mining was prosecuted upon these placer claims and not a dollar in placer gold was taken therefrom; (2) Williams' occupancy, cultivation and improvement of the land were notice to the world of his pre-emption claim. Notice of his intention to submit final proof and make entry at the local land office was published for a period of thirty days in a newspaper published at Aspen, and like notice was posted in the local office for the same period. It is not claimed that the placer claimants did not know of Williams' pre-emption claim, nor that they were not aware of his intended entry, and yet they did not interpose any objection to his final proof or to his entry, and more than six years elapsed before his purchase and final certificate were questioned by the present contest; (3) The portion of the placer claims upon which the best discoveries are claimed to have been made was, as before stated, entered as agricultural land in 1884 and patented as such in 1889, both of which were after the location of the placer claims; (4) Williams is shown to be a practical miner, and

yet it is not claimed that he has ever attempted, either before or since his entry, to carry on any placer mining there.

The local officers after listening to the testimony and having an opportunity to see the witnesses on the stand, found:

> That the land in controversy was not on February 11, 1885, or prior thereto, of any value for placer purposes.

Your office, on appeal, sustained this finding and, in speaking of the evidence produced by the mining company, said:

> The issue to be decided is whether or not, at the date of Williams' cash entry February 11, 1885, the ground in conflict with said placer claims was known to be mineral in character. The burden of proving the affirmative is, of course, upon the contestant. So far from establishing such affirmative of this issue, contestant seemingly did not *attempt* so to do, but, instead, nearly all the testimony submitted by contestant is introduced for the purpose of proving the *present* value of said placer claims.

These concurring findings of the local office and of your office should not be reversed unless shown to be clearly wrong.

As to the allegation in the mining company's protest, that the land in Williams' entry is not agricultural, there is little room for difference of opinion. The witnesses for the company assert that they do not consider the ground fit for cultivation, because it is broken, uneven, and made up of sand, gravel, and boulders. The witnesses for Williams assert that it is good for grazing; that the surface is not too rough to be cultivated; and that the soil is capable of producing all crops that will grow at that altitude. Several of them sustain their assertions by stating that it has been successfully cultivated, giving with considerable detail the amount of land plowed, the kind of crops planted, and the yield therefrom each season from 1881 until after Williams' final proof in 1885. The agricultural character of the land is established by a very large preponderance of the evidence.

The allegation in the protest that Williams' entry was not made in good faith for agricultural purposes, but in fraud for speculative purposes is not sustained by any evidence produced at the hearing. The theory of the mining company's protest was that the land was mineral, and not agricultural; that Williams was chargeable with a knowledge of this condition and that it necessarily followed that his preemption entry was made for speculative purposes. The premises of this argument having failed, the conclusion based thereon cannot stand. It is shown that Williams made a lake on part of the land covered by his entry, which he rented for skating purposes in the winter, and that he was at the time of the hearing making preparations to construct a racetrack. The lake was made in 1890, five years after entry, and the racetrack project had only been proposed in March, 1893. There is nothing in this to indicate bad faith in the original selection of the land. It is also shown that Williams laid out a part of the land in town lots, and sold several of them, but this was done after his final proof had been approved, payment made to the government, entry allowed and final

certificate issued. This he had a right to do and the charge of bad faith receives no support therefrom.

The mining company's protest asserts that these placer claims do not "contain any mineral in veins or in rock in place and the said tracts are claimed by the said Aspen Consolidated Mining company as placer ground." The order for a hearing, however, directed the local officers to cite certain lode claimants whose claims were believed to conflict with Williams' entry to appear at the hearing, but none appeared. There is some question under the decision of your office whether all of these lode claimants were notified of the hearing and what is here said will not affect the decision of your office on this point. Witnesses were examined at the hearing as to the presence of mineral in veins or in rock in place and the evidence is positive that no such mineral had been discovered within the limits of Williams' entry.

Up to this point the examination has been confined to the evidence submitted at the hearing. While the case was pending on appeal before this Department copies of certain deeds and other instruments were filed by the mining company, and affidavits relating thereto were then filed by Williams, all of which were considered in the former decision. Among the papers so filed were: a copy of a quit-claim deed from Williams to David R. C. Brown for the NW¼ of the SE¼ of said section 7, with a recited consideration of $110.000, dated February 19, 1892, and recorded June 17, 1893, a copy of a deed from Brown to Joel F. Vaile for an undivided one-fourth interest in the same land, with a recited consideration of $1.00, dated February 23, 1892, and recorded June 17, 1893; a copy of the articles of incorporation of the Free Silver Mining Company, acknowledged by Brown and two others, February 23, 1892; a copy of a deed from Brown and Vaile conveying said tract to The Free Silver Mining Company, with a recited consideration of "one dollar and other valuable considerations," dated July 1, 1893, and acknowledged December 30, 1893; a copy of a mortgage dated July 1, 1893, acknowledged October 25, 1893, and recorded December 30, 1893, given upon a portion of said land and certain personal and mixed property by the Free Silver Mining Company to Edward O. Wolcott, as trustee, to secure bonds in the sum of $100,000 "for the purchase of said machinery and for the prosecution of development work on the property of the company;" a copy of a deed from the Free Silver Mining Company to the Smuggler Mining Company for a part of said tract, with a recited consideration of $25,000 and the further sum of $50,000 to be paid out of the net smelter returns from any ore extracted from said land; a copy of a contract dated March 30, 1895, and recorded April 2, 1895, between the Free Silver Mining Company, The Smuggler Mountain Mining Company and the Della S. Consolidated Mining Company, adjusting, among other things, a controversy between said companies respecting the ownership of ores which "may be contained" in said tract; also a copy of a quit-claim deed from Williams to the Cow-

enhoven Mining, Transportation and Drainage Tunnel Company conveying a part of the NE.¼ of the SW.¼ of said section 7, containing twelve acres, dated, acknowledged and recorded October 9, 1895. This last deed contains the following provision:

> It is expressly understood and agreed that the interest conveyed by this deed is the right to the perpetual use of the surface of said territory only, and all other rights and interests in said territory are expressly reserved to the grantor his heirs and assigns.

These various transaction indicate a belief of the parties thereto that mineral in veins or lodes may be found in the land therein described by future development, but they do not establish its existence much less a knowledge of its existence at the date of Williams' entry seven to ten years before their various dates. Again, Williams is not bound by statements, recitals or reservations made in deeds or other instruments executed by his immediate or remote grantees. An absolutely unanswerable objection, however, to the consideration of these deeds and instruments in the present contest lies in the fact that they relate exclusively to land which lies altogether outside of these placer claims and which is not involved in the present controversy.

The various transactions were, however, treated in the former decision as discrediting some of the testimony for Williams. It is doubtful whether they have that effect, but, if so, it is upon matters immaterial to the issue. Further consideration will be given to some matters arising out of these transactions.

The former decision intimates that Williams made a wrong statement when he said at the hearing that he was then interested in the Cowenhoven tunnel, and in this connection calls attention to the fact that he had previously conveyed away the tract on which the tunnel is situate. His interest in the tunnel was that of a stockholder and his conveyance of the land did not operate as a transfer of his stock. It was also said his statements respecting the non-mineral character of the land can not have much weight in view of the fact that at the time of the hearing "there was in existence but kept from the public records the aforesaid deed of February 19, 1892, conveying forty acres of the land at an enormous price *to be used for mining purposes*." That land is not in controversy and there is nothing in the deed showing or even tending to show that the land was conveyed for mining purposes, nor is there any evidence showing that Williams was connected with the subsequent transactions regarding this land or even knew of them. To meet the contentions based upon these papers there were filed the affidavit of Williams that he never had any interest of any kind or nature in either The Free Silver Mining Company or The Smuggler Mountain Mining Company, the affidavits of Williams and Brown stating that the true consideration in the deed between them was $25,000, instead of $110,000 named therein, and the affidavits of Brown and Brunton setting forth that The Free Silver Mining Company's shaft was sunk for the purpose

of furnishing hoisting and drainage facilities for mines in the vicinity and with the expectation of connecting the foot of the shaft with the properties of The Della S. Consolidated Mining Company and The Smuggler Mountain Mining Company; that pumping arrangements have already been made with said companies; that it is the intention to use the land adjacent to the shaft for dumping grounds; that the shaft has been sunk to a depth of eight hundred and seventy feet, and that no ore had been mined or shipped therefrom.

It is stated in the former decision that Brunton in his last affidavit by saying that "he is one of the original projectors and owners" of the Cowenhoven tunnel contradicts himself, because in his testimony at the hearing "he denied being interested therein except as General Manager." This tunnel was constructed several years after Williams' entry and has no connection with the land in controversy, so the statements were both immaterial. The fact of a contradiction, if there were one, would not discredit his whole testimony. As a matter of fact, there is not necessarily a contradiction in the statements. In his testimony at the hearing he said in answer to questions 136, 360 and 361:

> I am general manager of the Cowenhoven tunnel.
>
> * * * * * * *
>
> I am not a stockholder in the Cowenhoven tunnel.
>
> * * * * * * *
>
> I am paid a salary as manager of the Cowenhoven tunnel. I also receive a certain percentage of the money paid to the Cowenhoven tunnel by the different mining companies for drainage of their mines.

His statement in the affidavits is as follows:

> That the affiant is one of the original projectors and owners of the Cowenhoven Tunnel, which was located in 1889 on said southeasterly 40 acres on said Williams ranch, and has been connected with the management of the same ever since.

Instead of disclaiming any interest except as general manager his answers indicate that he had an interest beyond his salary as manager. Even taking the other view of this testimony it does not follow because he was one of the original projectors and owners of an enterprise started in 1889, that he was necessarily an owner in 1893.

If all these papers were properly in the case, they would not have the effect of changing the conclusion upon the evidence submitted at the hearing. However, they are not properly in the case and as is usual with evidence irregularly put into a record on appeal, their tendency has been to obscure the real point in issue and to mislead the examiner.

It has been suggested that the mining company paid the government for the land in controversy in 1896 and that it is therefore entitled to a patent. It is true that payment to the government for land confers rights which should not be lightly set aside, but this applies equally to Williams who paid the government for this same land in 1885. So far, therefore, as the matter of payment goes Williams acquired the prior

right because his purchase preceded that of the mining company by eleven years.

It appearing that mistakes of a serious nature, as herein shown, were made in the former examination and decision of this case and that the former decision is not justified by the evidence and does manifest injustice to Williams and to those claiming portions of the land in controversy under conveyances from him, it is now withdrawn and set aside, the protest of the mining company is dismissed, and the case is returned to your office with instructions to cancel the placer mineral entry of the land in conflict and to take such further action as may be proper, in accordance with the views herein expressed and in accordance with the decision of your office which is hereby affirmed.

Approved,

WILLIS VAN DEVANTER,
Assistant Attorney-General.

CONTESTANT—PREFERENCE RIGHT—ESTOPPEL.

PRYOR ET AL. *v.* COUCH.

The departmental rule that the question of preference right will be deferred until an application is made for its exercise, is not applicable where the record clearly discloses that the contestant is disqualified as an entryman, and that the disability can not be removed during the period accorded for the exercise of said right, or where the contestant is estopped from entering the land as against the adverse claim of another party.

A contestant who at the time of initiating contest applies to enter part of the land covered by the entry under attack, omitting from his application certain tracts included within the existing settlement claim of a third party, and thereafter makes no protest against the occupancy and improvement of said tracts by such settler, is estopped, on the successful termination of his contest, from asserting, as against the settler, his preference right to enter said tracts.

Secretary Bliss to the Commissioner of the General Land Office, June 4, (W. V. D.) *1898.* (W. A. E.)

Joseph England, by his attorney, has filed a motion for review of departmental decision of December 11, 1897, in the case of David C. Pryor *et al.* against John M. Couch (25 L. D., 488), involving lots 1, 2, 3, 7, 8, and 9, fractional parts of the NE. ¼ of Sec. 9, T. 11 N., R. 3 W., Oklahoma, Oklahoma land district.

A brief statement of the proceedings heretofore had in this case is necessary to a clear understanding of the questions presented by the motion.

April 25, 1889, John M. Couch made homestead entry for the above-described land.

May 23, 1889, David C. Pryor filed affidavit of contest, alleging that said entryman was disqualified by reason of having entered the prohibited territory during the prohibited period. He asked that the

entry be canceled as to lots 8 and 9, and that he be permitted to make entry therefor. With his contest affidavit he filed a formal application to make homestead entry for said lots 8 and 9.

June 18, 1889, Jerome Monk filed affidavit of contest, alleging the disqualification of the entry, and also claiming settlement prior to the settlement or entry of the defendant.

July 18, 1889, James A. Robinson filed affidavit of contest, alleging that the entryman was disqualified, and that he (Robinson) was a prior settler as to said lots 8 and 9.

July 25, 1889, James Thompson filed affidavit of contest, alleging prior settlement and the disqualification of the entryman.

July 27, 1889, Hugh L. Ewing filed affidavit of contest, alleging that the entryman was disqualified. This contest affidavit was corroborated by David C. Pryor, the first contestant herein. July 25, 1893, Ewing filed an amended affidavit attacking the claims of all the other contestants, but conceding Pryor to be the first contestant against lots 8 and 9.

August 6, 1889, Joseph England filed affidavit of contest, alleging the disqualification of the entryman, and also that he (England) had settled upon said land prior to any legal settlement thereon by the defendant. July 18, 1891, he filed a disclaimer as to lots 8 and 9.

These several contests were consolidated, and a hearing was had at at which all parties were allowed to submit testimony. Robinson was not represented at the hearing, and it having been shown that he was deceased and had left no known heirs, his contest was dismissed.

February 20, 1895, the local officers rendered their decision recommending that Couch's entry be canceled, and that Pryor be awarded the preference right of entry. From this action Couch, Monk, Ewing, and England appealed. No appeal was filed on behalf of Thompson within the time allowed for filing appeal.

January 28, 1896, your office held Couch's entry for cancellation and awarded the preference right of entry to England as to lots 1, 2, 3, and 7, and to Pryor as to lots 8 and 9.

Appeal to the Department was filed by Couch, Pryor and Ewing. No appeal was filed by Monk.

May 12, 1896, Mrs. Mary B. Scissel, as one of the heirs of James Thompson, deceased, filed an appeal to your office from the decision of the register and receiver rendered February 20, 1895. She alleges in an affidavit attached to said appeal that contestant Thompson died January 17, 1895; that she is a daughter and one of the heirs of said Thompson; that she has had the land in controversy cultivated since the death of her father; and that her failure to appeal sooner from the decision of the register and receiver was due to the fact that she was never notified of that decision nor served with a copy of it.

No action was taken on this appeal by your office, but it was transmitted to the Department with the other papers in the case.

December 11, 1897, the Department affirmed your office decision, so far as it held Couch's entry for cancellation, but declined to consider, at the present time, any questions as to the preference right of entry.

Of the numerous specifications of error alleged in England's motion for review only the first, second, and sixth need be considered. They are as follows:

I. The Honorable Secretary erred in said opinion and judgment in omitting to pass upon the rights of said England and award him said lots 1, 2, 3, and 7, for the reason: (a) Said Pryor never asked that said entry of said Couch be canceled as to said lots last named (1, 2, 3 and 7), upon which said England was residing at the time said contest of Pryor was instituted.

II. The Honorable Secretary erred in said opinion in holding that said Pryor ever had a contest pending against said entry to have the same canceled as to said lots 1, 2, 3, and 7. The prayer of his affidavit of contest filed May 23, 1889, is as follows: "Therefore asks to prove said allegations and that said homestead entry No. 94 may be declared canceled as to lots Nos. 8 and 9 and forfeited to the United States." Clearly showing that at the time said Pryor instituted said contest against said entry for the cancellation of the same as to lots 8 and 9, he had no purpose of having the same canceled as to lots 1, 2, 3, and 7, knowing that said England was residing thereon and believing that said residence protected the rights of said England in the premises.

VI. The Honorable Secretary erred in said opinion in not holding that inasmuch as said Couch's entry was void, and inasmuch as said England settled on said land in good faith May 19, 1889, and has ever since made the land his home, and inasmuch as said Pryor's contest was not instituted until May 23, 1889, after England's settlement, and inasmuch as said Pryor's contest was not lodged against or leveled at the entry of Couch as an entirety, but only as against said lots 8 and 9, that the settlement right is superior to the claim of said Pryor, hence the judgment of the Honorable Commissioner was right and should be affirmed.

It is a well established rule of the Department that questions as to the preference right of a contestant should not be decided prior to application to exercise such right. The reason for this rule is, that the contestant's right to enter is to be determined by his qualifications at the time he files his application, and his condition may change between the date of the decision of the Department and the time he applies to enter. Thus an alien may contest an entry, but he can not exercise a successful contestant's preference right of entry. He may, however, subsequent to the decision of the Department, file his declaration of intention to become a citizen of the United States and thus qualify himself to make entry. Bjorndahl *v.* Morben, 17 L. D., 530. On the other hand, a woman contestant, qualified to enter at the date of the decision of the Department, may, subsequent to that decision and prior to the time she applies to enter, marry and thus disqualify herself.

Where, however, it is charged, or the record clearly discloses, that the disability under which the contestant labors is such that there is no possibility of its being removed between the date of the decision of the Department and the expiration of the time allowed a successful contestant to exercise his preference right, as, for example, where it is shown that he is a "sooner," or that he is estopped from entering the

land or a portion thereof as against a certain party, the reason for the rule no longer exists, and it would be a useless waste of time and probably of money to postpone the consideration of the question as to his preference right until such time as he applies to enter. This principle does not seem to have been affirmatively stated in any of the departmental decisions, but it was evidently applied in the cases of Dayton *v.* Hause *et al.*, 7 L. D., 542; Jeffers *v.* Miller, 15 L. D., 71; Norstrum *v.* Head, 24 L. D., 413; Parcher *v.* Gillen, 26 L. D., 34.

In the present case, the several contests were consolidated, the principal reason for this action being that some of the contestants had alleged prior settlement in addition to the charge that the entryman was disqualified. The contestants filed cross-complaints against each other, and the hearing was directed not only to the charges contained in the several contests against Couch's entry, but also to the question as to the rights of the respective contestants. Those rights were thus put directly in issue and were considered by both the local office and your office. The local officers recommended the dismissal of Monk's contest, and your office affirmed their action, for the express reason that it was shown by the record that Monk was disqualified by reason of having entered the prohibited territory during the prohibited period. Pryor's appeal from your office decision was solely on the ground that your office erred in awarding to England the preference right of entry to any portion of the land involved.

The rights of the several contestants thus having been put in issue, and all the facts upon which a decision as to those rights can be based being now in the record, it would be useless to further postpone their consideration.

There were six contestants in this case—Pryor, Monk, Robinson, Thompson, Ewing, and England.

Robinson died before the hearing, leaving no known heirs, and his contest was dismissed.

Monk failed to appeal from your office decision, and said decision has become final as to him.

The record shows that notice of the register and receiver's decision of February 20, 1895, was served upon all the known heirs of James Thompson, deceased (including Mrs. Mary Scissel), March 21, 1895, so that the long delay in filing appeal from said decision is not satisfactorily explained, and this contest need not be further considered.

Ewing's contest affidavit contained the single charge that the entryman was disqualified. It was filed subsequent to Pryor's, which contained the same charge, and falls to the ground on the success of Pryor's contest.

England alleged prior settlement and the disqualification of the entryman. This affidavit was filed subsequent to Pryor's, and the statement just made in regard to Ewing's contest applies with equal force to England's contest, so far as the charge that the entryman was

disqualified is concerned. He admits that he did not settle on the land involved until May 19, 1889, nearly a month after Couch's entry was made, and therefore his allegation of prior settlement fails.

The sole remaining question then is, whether Pryor is entitled to a preference right of entry to the entire tract covered by Couch's entry, or whether he is estopped as against England from entering more than lots 8 and 9.

Pryor's contest was under the act of May 14, 1880, and the charge alleged was one that went to the validity of the entire entry. He was not required to file an application to enter at the time he filed his affidavit of contest or to make any statement at that time as to the land he wished to enter, and if there were no adverse claims to be considered, he would not now be held bound by his premature declarations. At the time, though, that Pryor filed his affidavit of contest England was living upon and claiming lots 1, 2, 3, and 7. Pryor apparently respected this claim, for in his affidavit he only asked that Couch's entry be canceled as to lots 8 and 9, and his application to enter, filed at the same time, covered only lots 8 and 9. He stood by and saw England improving lots 1, 2, 3, and 7, without a word of protest. England, relying on the statements made by Pryor under oath as to the land he wished to enter, has spent time and money in improving the lots upon which he lives and prosecuting a contest against Couch's entry.

In the case of Enos *v.* Fagan (13 L. D., 283), Enos filed simultaneous affidavits of contest against a homestead entry and a timber culture entry, and prosecuted both contests to a successful termination. At the time he instituted these contests he filed timber culture application for the land covered by the timber culture entry he was contesting. He had previously exhausted his rights under the homestead and pre-emption laws. Fagan, learning that Enos had filed application for the timber culture tract, settled upon and began improving the homestead tract. Enos knew of this settlement, but stood by and made no protest. When the two entries were canceled Fagan filed pre-emption declaratory statement for the tract upon which he was living, and Enos changed his timber culture application over to the same tract. It was held by the Department that Enos was setopped as against Fagan from making timber culture entry of the land upon which Fagan was residing. It was said in that decision:

> He stood by and saw Fagan erect upon the land a fairly good house with board roof, board floor, two windows, two doors, estimated to be worth $75. He (Fagan) moved his family into it, and established his residence there while Enos was holding to his claim on the southwest quarter and trying to sell it. There is no evidence that he ever intimated to Fagan, in any way, that he (Enos) had any right to the southeast quarter or ever intended to assert any claim thereto. Fagan had a right to rely upon the record, which showed that Enos had elected to take the southwest quarter, and also upon the words and acts of Enos, which showed that he retained his claim upon it, and Enos having thus stood by, seeing Fagan making lasting improvements upon the tract in controversy, is estopped to assert a claim to the land which will take them from him.

See also the case of Pendleton *v.* Grannis, 14 L. D., 381.

The principle applied in the case from which we have quoted is applicable here. It must therefore be held that Pryor is estopped as against England from entering lots 1, 2, 3, and 7, and that England has the better right to those lots. Pryor's preference right is absolute as to lots 8 and 9 and good as to the remaining lots against every one but England.

Departmental decision of December 11, 1897, is modified accordingly.

SCHOOL LANDS—INDEMNITY—RESERVATION.

STATE OF WYOMING.

The act of February 28, 1891, amending section 2275 R. S., repealed so much of the proviso to section 2, act of July 10, 1890, as declares that the State of Wyoming shall not be entitled to select school indemnity in lieu of sections sixteen and thirty-six in the Yellowstone National Park; and under said section 2275 R. S., as thus amended, the State is entitled to such indemnity, in so far as said Park lies within its boundaries.

Secretary Bliss to the Commissioner of the General Land Office, June 4,
(F. L. C.) *1898.* (W. M. W.)

On October 30, 1897, the governor of the State of Wyoming addressed a communication to the Department, asking that information might be forwarded to him as to the number of acres of land which the State is entitled to select in lieu of school lands included in all Indian, military, or other reservations within the State.

In response to this request, the Department, on November 3, 1897, furnished him with a copy of a report from your office, dated November 23, 1897, upon the matters contained in his letter, which it was thought fully covered the matters on which information was desired by the governor, and he was also advised of the practice of the Department in relation to school indemnity selections.

January 3, 1898, the governor acknowledged the receipt of said departmental letter, and stated that he had also received from your office "a list of lands furnishing bases for the selection of indemnity land in lieu of sections 16 and 36, which fell within the limits of the Shoshone Indian reservation and the Yellowstone National Park timber reserve." As this list included only such school lands as are embraced in the two reservations named, the governor urges that the State is also entitled to select indemnity lands in lieu of sections sixteen and thirty-six embraced within that portion of the Yellowstone National Park which lies within the State of Wyoming.

The matter was referred to your office for report, and January 17, 1898, you transmitted a report thereon, in which you express the opinion that the State of Wyoming is not under the law entitled to

select indemnity school lands for sections 16 and 36, embraced in the Yellowstone National Park, in said State.

Your opinion seems to be based upon the theory that a provision contained in section 2 of the act of July 10, 1890 (26 Stat., 222), admitting Wyoming into the Union, precludes the selection by that State of indemnity school lands in place of sections 16 and 36 in the Yellowstone Park.

The governor of Wyoming contends that the provision cited was repealed and superseded by the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, and he insists that under the latter act the State is entitled to such indemnity school lands.

It will lead to a correct understanding and proper determination of the questions presented if these acts and others bearing on the subject matter involved are referred to at some length.

The Territory of Wyoming was organized by the act of July 25, 1868 (15 Stat., 178). By section 14 of said act it was provided:

> That sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to public schools in the State or States hereafter to be erected out of the same.

This provision was afterwards carried into the Revised Statutes of the United States as section 1946.

The Yellowstone National Park was established by the act of March 1, 1872 (17 Stat., 32, 33). By the first section of the act the boundaries of the park were defined and the lands therein were

> reserved and withdrawn from settlement, occupancy or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people.

The act of July 10, 1890 (26 Stat., 222) admitted Wyoming as a State, with the same boundaries which the Territory had under the organic act. The greater portion of the Yellowstone National Park is within these boundaries.

It appears from an examination of the Congressional Record that the act of July 10, *supra*, was first introduced in the House of Representatives, and when it passed that body contained nothing respecting the Yellowstone Park. The only reference to school lands, during an extended debate on other matters in the House, is found in the remarks of Mr. Oates, during which he said:

> The fourth section of the bill grants sections sixteen and thirty-six in every township of the State for public schools, which is the usual grant in the new States and is entirely free from objection. See Congressional Record, No. 286, 51st Congress, 1st Session, part 3, page 2664.

When the bill was before the Senate for consideration, the proviso to section 2 was proposed and adopted. Mr. Platt said:

> Mr. President, there is but one amendment which the Committee on Territories desire to propose, and that is in relation to the Yellowstone National Park, reserving

the jurisdiction and right of control of Congress over the Park. I hardly think it is necessary, but, in order to avoid any possible question about it, in behalf of the Committee, I offer this proviso. See Congressional Record, No. 290, 51st Cong., 1st Sess., part 7, page 6473.

The proviso was adopted by the Senate, and afterwards concurred in by the House, without debate in either of said bodies. Said proviso contained, among other things, the words that

said State shall not be entitled to select indemnity school lands for the sixteenth and thirty-sixth sections that may be in said park *reservation* as the same is now defined or may be hereafter defined.

Section 4 of said act granted to the State sections sixteen and thirty-six

in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto . . . . are hereby granted to said State for the support of common schools.

By the act of February 28, 1891 (25 Stat., 796), section 2275 of the Revised Statutes was amended so as to read:

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen and thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. *Any other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided,* Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory, shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however,* That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

The prohibition in the proviso to section 2 of the act of July 10, 1890, relates to the selection of indemnity for school lands in the Yellow-

stone Park. But for this proviso the State would be entitled to sections sixteen and thirty-six in the park, or indemnity therefor, as provided in section 4 of the act. In principle there is no reason why the State should not have indemnity for these school sections if indemnity is generally allowed for such sections where reserved, retained or otherwise disposed of by the United States.

The real question here involved is, whether the act of February 28, 1891, amending section 2275 of the Revised Statutes, repealed that part of the proviso to section 2 of the act of July 10, 1890, *supra*, which declares that the State shall not be entitled to select indemnity school lands for sections sixteen and thirty-six in the Yellowstone Park.

The Department has heretofore, in several instances, carefully considered the effect of the act of February 28, 1891, *supra*, upon special acts relating to school grants and the selection of school indemnity lands. In the instructions issued under said act, on April 22, 1891 (12 L. D., 400), it was held that the act of February 28, 1891, superseded the provisions of the prior act of 1889 relating to the school grants to the States of North Dakota, South Dakota, Montana and Washington, and that the school grants to those States should be administered under the later general law.

In the case of the State of California, 23 L. D., 423, it was held that the act of February 28, 1891, is applicable to all the public land States, and operates as a repeal of all special laws theretofore enacted, so far as they conflict therewith. In that case a full history of said act is given, including extracts from the reports of officers of the land department, the committees of Congress, and debates upon the bill while it was pending, as well as the authorities in support of the conclusion. See also State of Nebraska *v.* Town of Butte, 21 L. D., 220; State of Washington *v.* Kuhn, 24 L. D., 12; Todd *v.* State of Washington, 24 L. D., 106.

In the case of Johnston *v.* Morris, 72 Fed. Rep., 890, the circuit court of appeals for the 9th circuit held that this act was intended to provide a uniform rule for the selection of indemnity school lands, and is applicable to all States and Territories having grants of school lands.

In view of these authorities, it is clear that section 2275 of the Revised Statutes, as amended by the act of February 28, 1891, is applicable to the State of Wyoming, that its provisions should govern in the matter of selecting indemnity school land in said State, and that said section repeals and supersedes the provisions of the act of July 10, 1890, *supra*, in so far as they are in conflict.

The next question is: Does this section, as amended, authorize the State of Wyoming to select indemnity in lieu of sections sixteen and thirty-six in the Yellowstone National Park?

In construing a statute, aid may be derived from giving attention to the state of things as it appeared to the legislature when the statute was enacted. At the time this section was enacted, large bodies of

government lands in the public land States, outside of Indian and military reservations, had been reserved for public purposes; it was likewise well known that large bodies of such lands had been disposed of by the United States; Congress had established the Yellowstone National Park, and all the lands therein were "reserved," "dedicated," and "set apart as a public park;" school grants of sections sixteen and thirty-six in every township had been made to said States and Territories, which Congress intended at all times should be effectually carried out to their fullest extent, either by securing to said States and Territories sections sixteen and thirty-six in place, or other lands equivalent thereto, where the condition was such that the sections in place would not inure to such States or Territories.

There is nothing in the language of the section that in any degree tends to show that in enacting it Congress intended to withhold from any State or Territory any of the benefit of its school grant, and it is clear that if such intention had existed, it would have been expressed in clear and unmistakable language.

A cardinal and universal rule of construing statutes is, that if a statute is plain and ambiguous, and clearly expresses the sense of its framers, the statute itself furnishes the best means of its own expositions; and if the sense in which words were intended to be used can clearly be ascertained from its parts and provisions, the intention thus indicated should prevail.

The application of this elemental rule to the section in question is all that is required in order to arrive at a satisfactory answer to the question here presented. Its language is,

> other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory . . . . where sections sixteen or thirty-six . . . . are included within any Indian, military, *or other reservation, or are otherwise disposed of by the United States.*

The words "or other reservation" here used, when considered in the light of existing conditions, include and manifestly were intended to include every reservation (other than Indian or military) or withdrawals of lands for a public purpose, without respect to whether they should be temporary or permanent in character, and irrespective of the purpose for which such reservation or withdrawal was made. In other words, after specifically providing for Indian and military reservations, these words provide generally for *all other reservations* made by the United States for public purposes. The words "or are otherwise disposed of by the United States," following the words "other reservations," demonstrate that the latter were not employed in a restricted sense, but rather in their extended and broadened sense.

The lands in the Yellowstone National Park were "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park," by the express terms of the act creating it. If the lands in the park were con-

sidered simply as "reserved," then they would be within the words of the section under consideration; and the same is equally true if they were considered as having been disposed of by the United States.

Therefore, in determining the question as to whether the State of Wyoming is entitled to select indemnity for sections sixteen and thirty-six in the park, it is not necessary to pass upon the character of the reservation if the land is merely reserved, nor the character of the disposition if the act creating the park disposed of the land, for in either case, or in both cases, the State clearly has the right to select such indemnity, in so far as said park lies within its boundaries.

You are requested to transmit a copy of this communication to the governor of Wyoming, and the views herein expressed will be carried out by your office in the appropriate manner.

MINING CLAIM—ADVERSE PROCEEDINGS—PROTEST.

MITCHELL *v.* BROVO.

A charge that the discovery shaft of a mining claim was sunk on ground embraced within a prior valid subsisting location will not be heard, where in judicial proceedings the land including the discovery shaft has been awarded to the applicant.

A protest against proceedings on a mineral application does not warrant a hearing, if the allegations therein, and corroboration thereof, rest on information and belief only.

Secretary Bliss to the Commissioner of the General Land Office, June 4, 1898.

(W. V. D.) (E. B., Jr.)

This is an appeal by George J. Brovo, applicant for patent to the Peacock lode claim, survey No. 8663, Pueblo, Colorado, land district, from the decision of your office dated July 20, 1896, holding the notice of his application defective and requiring him to give new notice.

Said Brovo filed his application December 18, 1893. An adverse claim was filed by the claimants of the Deadwood lode locations Nos. 2, 3 and 4, suit was duly commenced in support thereof, and, on July 6, 1895, judgment was rendered in favor of the plaintiffs as to the conflict between the Peacock location and Deadwood locations Nos. 2 and 3, but in favor of the defendant as to the conflict between the Peacock and Deadwood No. 4.

On June 25, 1895, Horace H. Mitchell filed a protest against the Peacock application, alleging that he was part owner of the Minnie Lucina and the Lucky Diamond lode locations; that these locations embraced a large part of the Peacock location; that the Peacock discovery shaft was sunk upon ground embraced within the prior valid subsisting Deadwood No. 4 location; that no vein or lode of rock in place bearing mineral had been discovered by the applicant (who claims as locator) on the Peacock location; that the published notice of the

application for patent did not "sufficiently and properly locate the said claim;" that the said notice "did not name the adjoining claimants;" and that "the amount of work and labor done on said pretended Peacock lode is not of the value of five hundred dollars." The protest was rejected by the local office on May 5, 1896, "because protest is not deemed sufficient on which to order a hearing."

Your said office decision, on appeal by Mitchell, who assigned error upon each of the allegations of his protest, held the notice of application fatally defective for the reason that—

> in said published and posted notice no reference is made to any other mining claim than the Mascott as adjoining claims, or claims nearest to the claim specified in said application.

The local office was directed to notify applicant that in case of his failure to apply for an order for republication or to appeal within sixty days from notice his application would be canceled. It was also stated that it was not deemed necessary to take further action upon the protest, for the reason that—

> If this decision becomes final, and republication of the notice of application for patent for the Peacock lode claim is made, any one who may deem his interests injuriously affected thereby, will be allowed to protect the same, in the manner contemplated by the statute, by filing an adverse claim and commencing a suit in court thereon.

Applicant's appeal assigns error upon the requirement of republication and "in not dismissing the protest."

With the appeal were filed duly certified copies of the location certificates of the said Minnie Lucina and Lucky Diamond claims, which show that the former was located July 21, 1894, and the latter September 4, 1894. The period of publication for the Peacock claim expired in February, 1894. The Minnie Lucina and Lucky Diamond locations were therefore not in existence during the said period of publication, and no mention of them or their claimants could have been made in the notice of application. The notice, as stated in your office decision, correctly locates and describes the Peacock claim. It was error, therefore, to require new notice of the said application. Said decision, as to such requirement, is therefore reversed.

Inasmuch as your office did not consider the other allegations of the protest, the Department might now properly remand the case for their consideration. To avoid delay, however, they will be considered here.

The Peacock discovery shaft is within the conflict between that location and the Deadwood No. 4 location, but the fact that the said judgment awarded the ground there in controversy, including such shaft, to the applicant, is sufficient answer to the charge that the shaft was sunk on ground embraced in a prior valid subsisting location (Gowdy *et al. v.* Kismet Gold Mining Co., 22 L. D., 624; and American Consolidated Mining and Milling Company *v.* DeWitt, 26 L. D., 580).

Protestant's allegations as to the non-discovery of mineral and that

five hundred dollars in work and labor had not been expended upon the Peacock location, are made upon information and belief only, and the corroborating affidavit is likewise made. Such allegations, thus corroborated, are insufficient to warrant a hearing in view of the fact that the showing by the applicant upon these points is in due form and regular in every respect. See Buckley *v.* Massey, 16 L. D., 391; Shugren et al. *v.* Dillman, 19 L. D., 453; Parker et al. *v.* Lynch, 20 L. D., 13; and Foster *v.* Rees, 25 L. D., 125.

The protest is accordingly dismissed.

RAILROAD GRANT—ACTS OF JUNE 22, 1874 AND APRIL 21, 1876.

McCULLOUGH *v.* NORTHERN PACIFIC R. R. CO.

An entry confirmed under section 1, act of April 21, 1876, excepts the land covered thereby from the operation of the grant, and consequently affords no basis for a selection under the act of June 22, 1874.

A decision of the General Land Office that on relinquishment a railroad company will be entitled to select indemnity under the act of June 22, 1874, does not preclude departmental consideration as to the right of the company to the land relinquished, when the selection comes before the Department for approval.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 6, 1898.* (E. F. B.)

Your office on September 29, 1896, held for cancellation the selection made by the Northern Pacific Railroad Company July 13, 1891, of lots 1 and 2 and the E. ½ of the NW. ¼ of Sec. 18, T. 139 N., R. 51 W., Fargo, North Dakota, under the act of June 22, 1874 (18 Stat., 194), for the reason that the tracts assigned as a basis for said selection were covered by settlement claims at the date of filing of map of general route and at the date of definite location, and because the selected tracts are covered by the existing declaratory statement of Stanford Cutler, filed April 19, 1876.

From said decision the railroad company has filed an appeal, assigning the following grounds of error:

I. It was error to have held that the land designated by the company as basis for its selection of the above described tracts did not constitute a valid basis under the law.

II. The claim of Alexander McCulloch having been finally rejected, it was error not to have allowed the company to substitute other basis in support of its selection.

III. It was error to have held that the homestead declaratory statement of Stanford Cutler was a bar to the acceptance of the company's selection.

IV. If said filing was a bar, it was error, in the absence of adverse claim, not to have called upon said Cutler to show cause why his filing should not be canceled.

V. It was error for any cause to have rejected the company's selection.

The material question in this case is, whether the tracts assigned as a basis for said selection passed to the railroad company under its

grant, or whether they were excepted therefrom by claims subsisting at date of definite location.

It appears that the tracts originally assigned as a basis for said selection were within the indemnity limits, and said selection was therefore canceled. On July 13, 1891, the company filed an amended list, in which it assigned the NW. ¼ of the SE. ¼ and the E. ½ of the SE. ¼ of Sec. 11, T. 4 N., R. 3 W., Montana, as the basis for lot 1 and the E. ½ of the NW. ¼ of said Sec. 18, T. 139 N., R. 51 W., and lot 2 of Sec. 19, T. 11 N., R. 4 W., Montana, was assigned as a basis for lot 2 in said section 18. The former selection was subsequently canceled of record.

On May 20, 1895, Alexander McCulloch applied to enter said lots 1 and 2 and the E. ½ of the NW. ¼ of said Sec. 18, T. 139 N., R. 51 W., under the homestead law, which was rejected by the local officers. From this action he filed an appeal, but failed to make proper service upon the company. Your office, while declining to recognize any right of McCulloch under said appeal, considered the question of the validity of the selection by the railroad company, and finding that the tracts assigned as a basis therefor were actually settled upon and improved at the date of filing of the map of general route and at the date of definite location, and being thereby excepted from the operation of the grant to said company, it was held that the railroad company had no right to select lands in lieu thereof under the act of June 22, 1874.

The tracts designated as the basis for said selection were within the limits of the withdrawal upon map of general route, filed February 21, 1872, notice of which was received at the local office in the district in which these lands were situated May 6, 1872. They fell within the primary limits of the grant, as shown by map of definite location, filed July 6, 1882.

March 2, 1872, A. C. Quaintance made homestead entry of certain tracts of land in Sec. 14, T. 4 N., R. 3 W., Montana, which, on July 13, 1873, was amended by authority of your office so as to embrace the N. ½ of the SE. ¼ and the SE. ¼ of the SE. ¼ of Sec. 11, same township and range, in lieu of the same quantity of land in said section 14, a mistake having been made in the description of the land settled upon.

January 25, 1878, Quaintance filed a petition for relief under the act of April 21, 1876 (19 Stat., 35), alleging that he actually settled upon the tract in 1867. Acting upon this petition, your office held that his entry was confirmed by said act, and by letter of May 25, 1878, Quaintance was permitted to make final proof, and it was therein stated that the railroad company would be allowed to select an equal quantity of land in lieu thereof under the act of June 22, 1874, it having filed a relinquishment of the land in said section 11, embraced in Quaintance's entry, under the provisions of said act.

The action of your office allowing the homestead entry of Quaintance to be amended so as to embrace the N. ½ of the SE. ¼ and the SE. ¼ of the SE. ¼ of said section 11, in lieu of an equal quantity of land

in said section 14, which had by mistake been embraced in his homestead entry, was an adjudication by the proper authority that said tracts were the lands which he had settled upon and improved, and which he intended to enter and supposed he had entered by his said entry of March 2, 1878.

As against all persons who were not misled by his mistake, and who had not acted upon it to their injury, he had the right to have said entry amended to embrace the land which he intended to enter, to take effect from the date of his original entry. It was to all intents and purposes, so far as his rights were concerned, a homestead entry of such lands, made in good faith by an actual settler prior to the time when notice of the withdrawal was received at the local office, and having complied with the homestead laws and having made proper proof thereof, his entry was confirmed by the first section of the act of April 21, 1876, and he was, by the express terms of said act, entitled to a patent for the same.

The right of the entryman to receive patent for the land entered by him did not depend upon the relinquishment by the railroad company, for the reason that it had no right or title to relinquish. As the right to make entry and to receive patent for said land was confirmed to the entryman by said act of April 21, 1876, it necessarily withdrew said tract from the operation of the grant, for the purposes contemplated by said act, and the company could only be compensated for this loss by the selection of lands within the indemnity limits. It has no authority to select lands within the granted limits, except under the act of June 22, 1874, which only authorizes the selection of lands in said limits in exchange for lands inuring to the railroad company under its grant, the title to which it has relinquished in favor of actual settlers.

The letter of your office of May 25, 1878, stating that said company would be allowed to select other lands in lieu of said relinquished tracts under the act of June 22, 1874, does not preclude the Department from determining whether the company had a right that it could relinquish, and when selections made in lieu of such relinquished lands come before the Department for approval, they will be rejected if found that the company had no right or title to the lands relinquished. Southern Pacific R. R. Co., 22 L. D., 185; Oregon and California R. R. Co., 25 L. D., 248; Winona and St. Peter R. R. Co. *v.* Warner, 6 L. D., 611.

The remaining part of said basis, to wit, lot 2 in Sec. 19, T. 4 N., R. 4 W., Montana, is included in the homestead entry of Peter Wilson, made February 22, 1872, upon which he submitted final proof and received final certificate December 22, 1877, under the authority of your office holding that his entry was confirmed by the act of April 21, 1876. The railroad company filed a relinquishment of this tract also, and by said letter of May 25, 1878, it was stated that the company would be permitted to select other land in lieu thereof, under said act of June 22, 1874.

Under the view heretofore announced, the right of Wilson to perfect his entry and receive patent for said tract was confirmed by the act of April 21, 1876, and the company has no right to make selections of lieu lands under the act of June 22, 1874, upon said tract as a basis.

The decision of your office holding for cancellation said selection is affirmed, and if McCulloch should renew his application you will take appropriate action thereon.

ISOLATED TRACT—UTE INDIAN LAND.

H. R. SAUNDERS.

Ute Indian land subject to disposal under the restrictions of section 3, act of June 15, 1880, can not be sold as an isolated tract under section 2455, R. S., as amended by the act of February 26, 1895.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *June 6, 1898.* (J. L. McC.)

H. R. Saunders has appealed from the decision of your office, dated October 20, 1896, rejecting his application to purchase, as an "isolated tract," the SW. ¼ of the NW. ¼ of Sec. 8, T. 15 S., R. 95 W., 6th P. M., Montrose land district, Colorado.

The statute authorizing the sale of "isolated tracts" of land is Sec. 2455, R. S., as amended by the act of February 26, 1895 (28 Stat., 687), which permits such sale:

Provided, That lands shall not become so isolated or disconnected until the same shall have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government.

The land here in question is a part of the lands within the limits of the former Ute Indian reservation that were declared to be public lands by the act of July 28, 1882 (22 Stat., 178), and thereby made subject to disposal under the restrictions of section 3 of the act of June 15, 1880 (21 Stat., 199), which provides, *inter alia:*

That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law, and shall be subject to cash entry only in accordance with existing law.

As the land here in question has not "been subject to homestead entry for a period of three years" (indeed has never been subject to homestead entry at all), your office holds that it has no authority to sell the same as an "isolated tract." It must therefore be disposed of under the provisions of said act of 1880, inasmuch as the act of March 3, 1891 (26 Stat., 1095), repealing the pre-emption law, contained, in section 10 thereof, an express exception in favor of lands in the category of those within the former Ute Reservation.

The language of section 10 is as follows:

That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of any land ceded to

the United States, to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements, except as provided in section five of this act.

The decision of your office rejecting Saunders' application to purchase under the amendatory act of February 26, 1895, *supra*, is therefore affirmed.

RAILROAD GRANT—LANDS EXCEPTED—PRE-EMPTION FILING.

UNION PACIFIC RY. CO. *v.* WADE.

An unexpired pre-emption filing existing of record at the date of a railroad grant excepts the land covered thereby from the operation of the grant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 6, 1898.* (F. W. C.)

The Union Pacific Railway Company has appealed from your office decision of May 12, 1897, holding that the E. ½ of the SE. ¼, Sec. 33, T. 7 S., R. 8 E., Topeka land district, Kansas, was excepted from its grant, made by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356).

This tract is opposite the portion of the road shown upon the map of definite location filed January 11, 1866.

The lands in this township were offered in accordance with proclamation No. 636, beginning September 19, 1859, at Ogden, Kansas.

The tract here involved was not sold at the public auction, and thereafter was subject to private purchase, being known as "offered" lands.

On July 31, 1861, William Shute filed pre-emption declaratory statement No. 707 covering this tract, in which settlement was alleged same date, which filing has never been perfected.

On June 21, 1881, the land was listed by the company preliminary to patent, but has not been included in a patent to the company.

On December 9, 1896, the local officers, without notice to the company, permitted William L. Wade to make homestead entry of the land.

These facts were considered in your office decision of May 12, 1897, in which it was held that as said pre-emption filing by Shute was intact upon the record at the date of the grant, under the decisions of the supreme court in the case of Kansas Pacific Railway Co. *v.* Dunmeyer (113 U. S., 629) and Whitney *v.* Taylor (158 U. S., 85), the tract was reserved from the operation thereof.

Under the pre-emption act of September 4, 1841 (5 Stat., 453), this tract having been offered, Shute was required to make proof and payment within twelve months from his settlement, which time would have expired July 31, 1862. This period had not expired at the date of the grant, and it is shown that his filing remained upon the records uncanceled at that time.

The filing was, therefore, a subsisting or existing claim at the date of the grant, and, following the decision in the case of Northern Pacific Railroad Co. *v.* Smalley (15 L. D., 36), served to reserve the land from the operation of the grant.

Your office decision is therefore affirmed, and the listing by the company will be canceled.

Northeast Perry.

Motion for review of departmental decision of June 29, 1897, 24 L. D., 580, denied by Secretary Bliss, June 7, 1898.

PUBLIC SURVEY—RECORDS—ISLAND—JURISDICTION.

Benecke *v.* Powell.

The United States surveyor general of a State on the completion of the public surveys therein, and the consequent closing of his office, is required, under section 2218 R. S., to deliver the plats and records of said office to the proper officer of said State; and thereafter, if it appears that the plat of any of such surveys is not found on file in the General Land Office, the Commissioner may procure from the proper State authority a certified copy of said plat, which will be of the same force as the original would have been if on file.

The jurisdiction of the Land Department over a tract of public land, properly surveyed as an island, is not affected by the fact that subsequently said land, in consequence of a change in the channel of the river in which it was situated, ceases to be an island.

Secretary Bliss to the Commissioner of the General Land Office, June 7, 1898.

(W. V. D.) (J. L. McC.)

George W. Powell, on September 3, 1894, made homestead entry for fractional section 24, T. 53 N., R. 20 W., Boonville land district, Missouri.

Said fractional township is a part of what was formerly known as "Island No. 23," in the Missouri river. On July 6, 1895, Louis Benecke initiated contest against said entry, alleging that said "Island No. 23" no longer exists;

that the same has been wholly washed away by the water of the Missouri river; that by reason of the gradual shifting of the channel of said river, the former situation of said Island has been attached to and become a part of that portion of Saline county, opposite the former situation of said island, the fee of which is now vested in the plaintiff, Louis Benecke, and the legal heirs of Sterling Price, as special partners; that since the death of said Price, plaintiff has been appointed and has qualified as administrator of said partnership estate, and has actual charge thereof, including the land in controversy; and that, for himself and as administrator of the estate of said Sterling Price, he claims the land in controversy as the riparian owner of said accretions.

A hearing was had, beginning August 28, 1895, at which a large

amount of testimony was taken. As the result of said hearing the local officers, on September 6, 1895, rendered decision as follows:

From the testimony presented we find that Island No. 23, and that part of it involved herein, is in existence at the present time, and was never wholly washed away. We also find that the land embraced in said homestead entry No. 15,560, in the name of George W. Powell, is not an accretion to that part of Saline county, Missouri, opposite the former situation of said island. We therefore are of the opinion that said homestead entry No. 15,560 should not be canceled; and said contest is hereby dismissed.

Benecke appealed to your office; which, on August 22, 1896, after setting forth the record facts, substantially as above, found and held:

I am of the opinion that you had no jurisdiction of the subject matter involved between the parties; hence this office has no jurisdiction whatever to settle such a contest. It is a controversy to be settled by the local courts. Said contest is therefore dismissed.

Benecke has appealed to the Department.

At the hearing, the testimony was contradictory beyond reconciliation. That of the witnesses for the contestant is given mainly in the form of depositions. Thus, E. W. Price deposes, in effect, that the land which formerly was "Island No. 23," gradually washed away, until about 1874 or 1875, when the last particle of it disappeared, and for several years there was no sign of any island left, even at low water; but afterward land began to form gradually, by accretion to the main land south of the island (the south bank of the Missouri river as it then existed), which eventually extended over the exact locality where Island No. 23 formerly had been.

Price's testimony is corroborated by that of several other witnesses—among others, that of one William Wegner, who testified that he resided on the island from 1870 to 1875, but during that period it was continually washing away, and at the last named date he "had to move off the island because it was washing away, and all of it did wash away, and no part of it was left."

The testimony in behalf of the defendant includes the entire record history of the land and adjacent country, for nearly a century past.

The records of your office show that the land both north and south of the Missouri river was surveyed in 1816. Said surveys did not include Island No. 23, in the Missouri river; but it is alleged that it was surveyed in 1820. No plat of survey bearing that date, however, appears to be on file in your office. There is little doubt that a survey of said island was made about that date; but whether a little earlier or a little later is not a vital question.

On March 8, 1887, your office wrote to the State Register of Lands, at Jefferson City, Missouri, as follows:

MARCH 8, 1887.

REGISTER OF LANDS,

Jefferson City, Missouri.

SIR: This office is in receipt of several communications in regard to the survey of "Island No 23," in the Missouri river, which, it is alleged, embraces parts of sections

13 and 24, township 53 north, range 20 west; and section 18, township 53 north, range 19 west, in Saline county, Missouri, according to the survey made south of the Missouri river.

You are requested to examine the records of your office, and ascertain whether or not there appears an approved plat of the survey of said Island No. 23; and if one is found, please forward a certified copy thereof for the files of this office, at the earliest practicable date.

If you have no approved plat on file, please state whether there is any information in your office relative to an official survey of said land.

Very respectfully, WM. A. J. SPARKS,
Commissioner.

To the above letter the following answer was received.

STATE OF MISSOURI,
OFFICE OF REGISTER OF LANDS,
City of Jefferson, March 18, 1887.

SIR: In compliance with the request contained in your letter "E," of the 8th inst., I herewith enclose to you certified copies of the plat of Island No. 23, in the Missouri river, situated in township 53 N., R. 19 W., and Tp. 53 N., R. 20 W., south of Missouri river.

The plat of survey of Tp. 53 N., R. 20 W., was approved by Wm. Cuddy, Sur. Gen., Feb'y 22, 1862.

Tps. 52 and 53 N., R. 19 W., was approved by Wm. Cuddy, Sur. Genl. Febr'y 12, 1862.

No part of this island is in Tp. 53 N., R. 21 W., S. of R.

Very respectfully, your obedt. servant,

ROBERT MCCULLOCH, *Register,*
By V. M. HOBBS, *Chief Clerk.*

Hon. WM. A. J. SPARKS,
Comm'r Genl. Land Office, Washington, D. C.

The certified copy of surveys thus transmitted were thereupon made a part of the records of your office.

At the time of the survey of this portion of the State of Missouri (in 1816), the Missouri river, which before reaching this point had run in a nearly southeasterly direction, here made a sharp turn toward the north, and ran northward for between two and three miles; then it curved and ran eastward for about a mile; then it turned and pursued a southward course for between two and three miles. It had thus, after making a detour of about six miles, returned to within about half a mile of the point where it left its southeasterly course, thereby nearly enclosing a peninsula half a mile across from west to east at the isthmus or neck, and not quite a mile wide at its widest point. At the northernmost point in this northward bend of the river, an island was situated, which was currently known as "Island No. 23." This island embraced not quite one square mile of land.

Different parts of said so-called "Island No. 23," recognized by your office as being surveyed public lands of the United States, were disposed of by the local officers, with the approval of your office, to applicants under the homestead law—one of whom is the contestee in the case at bar.

The land in controversy, however, is not *now* an island. The testimony taken at the hearing shows that since the earliest known period

in the history of this region, the waters of the Missouri have been wearing away the neck or isthmus of the peninsula hereinbefore referred to, cutting it narrower and narrower. In the spring of 1879 it excavated for itself a passage directly across the peninsula, which since that date has been its only channel. The former channel became dry as soon as the water could flow off from it. Thereupon, of course, the land which had previously been known as "Island No. 23," at once ceased to be an island; for thenceforth it was no longer surrounded by water, but by other land, which until the sudden change in the river's channel, had been submerged.

A large number of witnesses testified that the island at the last hour of its existence as an island was the same land that had been in existence at that spot since it became known to white residents.

The entryman, Powell, testified to cutting down a cottonwood tree four feet in diameter; also to finding a walnut stump (the tree having been previously cut down by someone else) about three feet in diameter, which had grown on the spot, and had not been deposited there as drift.

Perry Coleman testified to the existence on the island of trees from three and a half feet in diameter down; in one case he "dug down four or five feet by the side of one of these stumps, and found no end to the roots, and it was perfectly solid in the ground" (this being the stump of a walnut tree.) This witness had lived in this vicinity since 1856; he had known this land since 1858 or 1859, and it had not been washed away and re-deposited; he "can see trees there today which were there at that time" (1858 or 1859).

Josiah G. Martin testified that he has lived near the island, on the main land on the north side of the river as it formerly ran, since 1861; part of the time he lived within half a mile of the land in controversy, a part of the time about eight miles away; it is the same that he knew as an island in 1861; it is not possible that it could have washed away at any time since without his knowledge.

Daniel A. Hallett lives a mile and a quarter from the land in controversy; has been acquainted with said land since 1872; it has ceased to be an island because about 1881 the river suddenly changed its course; the bed of the old river is farming land now, and this witness is farming some of it himself; as for the trees on the land in controversy (added the witness) "I am sixty-two years old, and they are older than I am; I want to tell you this right now, that this island never was washed away."

George Reider has lived within five miles of the land since 1867, and has since that date been well acquainted with it; it is the same land then known as "Island No. 23;" it is in about the same shape it was then, except that the water has receded and left land above water that then was the bed of the Missouri; instead of any of this island washing away, the river cut away land from Saline point—the northernmost

point of Saline county adjacent on the south—"and always made to this island;" if there was any difference, the island increased in size rather than diminished, up to the time when the river cut its new channel three miles south; there formerly were more big trees on the island than now, but persons who lived in the vicinity cut them down and used them for building purposes.

Samuel Petticord has been acquainted with the land in controversy since 1869; thinks the island then contained about five hundred or six hundred acres; the land there now is the same land that was there in 1869 except for the cut-off. This witness corroborated preceding witnesses as to the presence of trees from four feet in diameter down, that grew on the island, and were not deposited thereon as drift.

John Howard testified that he resides "in the old Missouri bed;" has been acquainted with the land in controversy since 1877; the most of the land that formerly was the bed of the Missouri in this vicinity is now good farming land, but in some places there are sloughs or small lakes along the line of the former channel; the deepest channel of the river was north of the island, though boats used to go south of the island—between it and Saline Point—sometimes in high water.

Hiram Horner has been acquainted with the land in controversy since 1852; it is the identical land he knew as an island in 1852; it was overflowed, or nearly so, by high water in the Missouri sometime in the seventies, but has never been washed away; corroborates the testimony of preceding witnesses relative to trees from four feet in diameter down, growing upon the land and certainly not deposited as drift.

L. L. Williams has known the land since 1870; it has never been washed away; the trees that were then on the land have some of them been cut down, some remain, looking very much as they did twenty-five years ago, "and the lay of the land generally is the same."

E. O. Williams has lived about a mile from the land in controversy from 1870 until now; it has never washed away; it could not have done so without his knowledge; sets forth in detail its topography as it was when an island and as it is now. This witness describes the change in the course of the river, in 1879, as follows:

> It cut through very suddenly. There was a great bend in the river southwest of the island, and it kept cutting or washing until it cut through; when it cut through the entire channel of the river changed; the water running where it cut through, drew the volume of the water from around the island, through the new channel; I owned a farm about three miles below the island, on the Missouri river, and the river cut this land in two—I mean my farm.

William Wegner's statement, *supra*, that he was compelled to leave the island in 1875, because it was so nearly washed away, and that the last particle of it disappeared soon afterward, is directly traversed by the testimony of George Reider. (In the transcript of Reider's verbal testimony the name "Wegner" is written "Wagner"; but there is no question that the two are identical.)

Q. Did you help move anybody from that island? If so, when? A. Yes, sir; Mr. Wagner; I think it was in the month of June, 1877.

Q. To your own personal knowledge did Mr. Wagner ever move back upon that island? A. Yes, sir, in the fall, sometime after the water went down, in 1877.

Q. Did you have any occasion to go upon that island in the fall of 1877? A. Yes, sir, I went over there. Mr. Wagner's wife died, and me and Mr. Hallet went together to take care of the remains.

Mr. Hallett testified to assisting in the removal of Mrs. Wagner's corpse from the island, in September, 1877, and that the island was of substantially the same shape at that date that it had been since he first became acquainted with it.

This is a case in which (the testimony being irreconcilably conflicting) the decision of the local officers in regard to matters of fact is entitled to special consideration. Irrespective of this rule, however, the strong preponderance of evidence in the case at bar favors the conclusion that the land in controversy has been in existence as public land belonging to the United States since the earliest public surveys of the region including it, that it never has been "washed away," and that it is in no sense of the word an "accretion" to any other land.

The appeal alleges that it was error on the part of your office

to entertain a copy of a plat of said island No. 23, in said townships, from the Register of Lands for the State of Missouri, and offer said island for sale.

The original records of survey on file in the office of the U. S. surveyor general for the State of Missouri, were, upon the closing of his office, by him delivered to the proper officer of the State of Missouri, in accordance with Sec. 2218, R. S. Thereafter

the same authority, powers, and duties, in relation to the survey, re-survey, or sub-division of the lands therein, and all matters and things connected therewith, previously exercised by the U. S. surveyor general,

were "vested in and devolved upon the Commissioner of the General Land Office" (Sec. 2219 R. S.). When your office procured from the proper officer of the State of Missouri, with whom it had been deposited, a certified copy of its own survey, such certified transcript, thus made a part of the records of your office, thenceforth had all the validity, force, and effect that the original document would have had if it had been on file. It does not appear that your office has, in the respect above referred to, exceeded its jurisdiction or committed any error.

The second allegation of error is that, "if said Island No. 23 was surveyed in 1817 . . . . and the same was subsequently washed away," etc., then your office erred in its conclusion. Inasmuch as it has been shown that the island has not been washed away since its survey, the question as to whether the course pursued by your office would have been proper in case it had been, is a purely hypothetical one, which there does not appear to be any occasion for the Department to consider.

The remaining allegations amount in substance to the proposition that it is inconsistent on the part of your office to entertain jurisdiction of the land for the purpose of disposing of the same, and to deny the possession of jurisdiction for the purpose of determining whether the claim of the entryman is valid.

Under the circumstances of the case at bar, this point would appear to be well taken. Your office decision does not give any reason why it holds that it possesses no jurisdiction in the case; but it is probably from the fact that it considered some question of "accretion" to be involved; but, as hereinbefore shown, there is no question of "accretion" here. No reason appears why your office has not as complete jurisdiction to determine the legality of this entryman's claim as of the claim of any other entryman upon public lands of the United States.

While unable to concur with your office in its conclusion in this respect, nevertheless, in view of the fact that the contestant has shown no right to the land in controversy, the Department affirms the judgment of your office in dismissing the contest.

The decision appealed from is modified as above indicated.

PRACTICE—PROTEST—SCHOOL GRANT.

STATE OF UTAH *v.* ALLEN ET AL.

The corroboration of a protest is not essential where the Land Department is bound to take judicial notice of the matters charged.

The grant of school lands to the State of Utah became operative on its admission to the Union, and lands then of known mineral character did not pass to the State, though not in terms reserved from said grant.

Secretary Bliss to the Commissioner of the General Land Office, June 8,
(W. V. D.) *1898.* (E. B., Jr.)

This is an appeal by the State of Utah from the decision of your office, dated February 11, 1898, dismissing its protest, filed January 29, 1898, against the issue of patent to the Cleopatra lode claim, Lake City, Utah, mineral entry No. 2249, made August 3, 1897, by C. E. Allen and others. The said claim is part of the E. ½ of the SW. ¼ of section 36, T. 10 S., R. 3 W., said State. The protest of the State is on the ground that the claim is situated in a school section the title to which, it is alleged,—

passed to the State of Utah at the the time of the taking effect and approval of an act of Congress known as the enabling act for the State of Utah, and that said mineral entry was not discovered or located until after the State of Utah was admitted into the Union.

Your said decision dismissed the protest for the reason that it is uncorroborated, does not ask for a hearing, and does not deny that the land embraced in said claim was known to be mineral in character at

the date of the admission of the State. Thereupon the State, through its attorney general, duly gave notice of appeal and filed argument. No specification of errors, however, as required by rules 86 and 88 of practice, has been filed.

Asserting title to the land in controversy, the State appears in the character of a contestant, and the case becomes subject generally to the rules of practice relating to contests. The protest does not, however, come within the requirements of rule 3, cited in your decision, for the reason that no fact is alleged except such as the land department is bound to take judicial notice of (Draper *et al. v.* Wells *et al.*, 25 L. D., 550). The other objections to the protest are not fatal. In view of the importance of the questions presented, the defect in the appeal, above pointed out, will be waived, no objection thereto having been made by the mineral claimants.

In its argument the State makes two contentions:

First: That the said grant took effect from the date of the approval of the enabling act, July 16, 1894; and

Second: That as the grant in question contains no reservation of the mineral lands, either express or implied, the same passed to the State absolutely as of the date of the approval of the said act, unless they had been otherwise disposed of prior thereto.

The granting words in point, as found in section six of the said act (28 Stat., 109), are:

> That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior.

The section was surveyed in the field March 18, 1873, the survey approved April 17, 1873, and the said SW. $\frac{1}{4}$ returned as agricultural land, although nearly all the remainder of the section was returned as mineral land. The said lode claim was not located until April 30, 1896, but from the records of your office and from evidence filed in support of the said entry it would appear that a large part of the said section, including the land in controversy, has been held and worked under the mining laws for its mineral deposits since long prior to the admission of said State. Utah was admitted as a State of the Union January 4, 1896 (29 Stat., 876). In view of the evidence as to the character of the land, the State having made no showing whatever upon that point, and its appeal in effect conceding the known mineral character thereof at the date of the admission of the State, the Department is abundantly warranted in the conclusion, for the purposes of this case, that such was its status.

As to the time when the grant was to take effect, the language used

is so explicit, it would seem, as to leave no room for doubt. It was to do so "upon the admission of the said State into the Union." The land in question was surveyed land at that time, so that if it was not reserved in terms by the grant, or otherwise, the right of the State at once attached. In State of Washington *v.* McBride (18 L. D., 199), the language of the grant of school lands to the State being the same as that above quoted, as respects the time when the grant should become operative, it was held by the Department that the grant took effect upon the admission of the State. The first contention of the State, in the case at bar, can not, therefore, be upheld. The conclusion seems irresistible that the grant did not take effect until the admission of the State.

Read by itself, it is true, as contended by the State, that the grant in question contains no reservation therefrom, either express or implied, of mineral lands. In the recent case of the Florida Central and Peninsular Railroad Co. (26 L. D., 600) the company, as successor to the State of Florida under a grant of lands by the act of May 17, 1856 (11 Stat., 15), contended, as the State of Utah now does, that mineral lands passed under the grant. There was no reservation, express or implied, of such lands in the language of the grant. The grant was made before there had been any express reservation of such lands from any railroad grant and long before the provisions of the present mining laws or any of them had any existence. In that case, notwithstanding, upon full and careful consideration, the Department held (syllabus):

The act of May 17, 1856, making a grant of lands to the State of Florida to aid in the construction of railroads does not in express terms include mineral lands, nor are such lands expressly excluded therefrom, but in view of the uniform and settled policy of the government to reserve such lands from grants to States or corporations for any purpose, it is held that all such lands, whether valuable for phosphate or other mineral deposits, are excepted from the operation of said grant.

On July 26, 1866 (14 Stat., 251), an act was passed by Congress which was the beginning of the existing plan for the disposal of public mineral lands. By the acts of July 9, 1870 (16 Stat., 217), and May 10, 1872 (17 Stat., 91), the plan was further developed and perfected. As a very important part of this plan it is now provided by section 2318 Revised Statutes, that—

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

This reservation has been in force since December 1, 1873, and therefore long prior to the admission of Utah. Whether such a general reservation was expressed in any statute prior to that date, it is not necessary in this case to inquire. Considering its effect in Deffeback *v.* Hawke (115 U. S., 392), which was a case wherein the parties were claiming a tract of land under the mining laws and the townsite laws, respectively, the Supreme Court said (p. 402):

Title, therefore, to lands known at the time to be valuable for their minerals, could only have been acquired after December 1, 1873, under provisions specially

authorizing their sale, as found in these (mining) statutes, except in the States of Michigan, Wisconsin, and Minnesota, and after May 5, 1876, in the States of Missouri and Kansas.

It must therefore be held that the second contention of the State can not be maintained, and that the land here in controversy having been known to be valuable for its minerals at the date of the admission of the State, title thereto did not pass to the State under its said grant, but remained in the United States as reserved mineral land.

For the reasons herein stated the judgment of your office dismissing the protest is affirmed.

MINING CLAIM—NOTICE OF APPLICATION.

GOWDY *v.* CONNELL.

The failure of an applicant for mineral patent to mention in his posted and published notices the names of adjoining claims, as shown by the field notes and plat of the official survey of the applicant's claim, is a fatal defect, and requires new notice of application.

Secretary Bliss to the Commissioner of the General Land Office, June 8, (W. V. D.) *1898.* (P. J. C.)

August 30, 1894, J. Arthur Connell made application for patent for the Big Chief and Big Mike lode mining claims, survey No. 8868, Pueblo, Colorado, land district. It seems that one or more adverses were filed and suits instituted in support thereof and prosecuted to final judgment.

April 15, 1895, the claimant made application to purchase, and entry was made February 15, 1896.

July 8, following, your office required the surveyor-general of Colorado to allow the applicant sixty days in which to make application for an amended survey to show all exclusions especially those portions "excluded in pursuance of judgments."

It appears that an amended survey was made and the plat and field-notes thereof forwarded to your office by the surveyor-general October 2, 1896.

October 3, following, Wm. H. Gowdy filed a protest against said entry alleging that the entryman had failed to comply with the requirements of the statutes and rules, in, first, failing to give the section in which the claims are situated in the printed and published notices; second, that the notices failed to give the number of feet claimed from the point of discovery; third, that the notices failed to give the names of adjoining claimants on the same and other lodes; and, fourth, that the notices did not state whether the locations were of record, or where such record could be found. It is further alleged that the Chicago Girl lode, "mineral survey No. 8844, the property of this protestant, was surveyed for patent and staked upon the ground with official patent

stakes at the time when said applicant made his application for patent," and that this claim was not mentioned as an adjoining claim. The protestant asks that in view of these omissions the applicant be required to publish and post new and sufficient notices.

On consideration of this protest your office decided, on October 13, 1896, that:

> This protest is not such a one as requires or justifies the ordering of a hearing, but simply directs the attention of the office to defects in the published notice and protests against the issuance of patent upon the entry until these defects have been cured by the republication of a correct notice.
>
> An examination of the record shows the grounds of said protest to be well taken and you are accordingly directed to notify the entryman that he will be allowed sixty days from notice within which to begin a republication of his notice of application for patent, in accordance with the provisions of paragraphs 29, 34 and 35 of the mining circular. Said republication to continue for the statutory period of sixty days and to be accompanied by reposting upon the claim and in the local land office.

From this judgment the mineral applicant has appealed, assigning numerous grounds of error.

The decision of your office was based on the case of Gowdy *et al. v.* Kismet Co. (22 L. D., 624). The notice in that case was similar to the one at bar, in all but one of its essential features. On review of that case, however, the Department, on February 27, 1897 (24 L. D., 191), modified the former decision to the extent of holding that the notice published was in conformity with the practice prevailing in your office at the time and was sufficient. In so far, therefore, as these notices are similar, the ruling in the last cited decision will apply to the case at bar.

But the objection in the protest to the failure of the posted and printed notices to mention adjoining claims is found to be well taken. The Chicago Girl lode claim is recognized in the field-notes of the survey of the Big Chief and Big Mike and is referred to by its official number—No. 8844. It is also platted on the official plat with the applicant's claims. Under paragraph 29 as it existed at the time this application was presented, it was incumbent on the applicant to have named in the notices the Chicago Girl, or given its official survey number as an adjoining claim. This was not done. The notices were not, therefore, in compliance with the rules, and for this reason your office judgment is affirmed.

MINERAL LAND—GYPSUM CEMENT—AGRICULTURAL ENTRY.

PHIFER *v.* HEATON.

Land containing a deposit of gypsum cement, and more valuable on account of such mineral than for agriculture, is not subject to agricultural entry.

Secretary Bliss to the Commissioner of the General Land Office, June 8, 1898.

(W. V. D.) (P. J. C.)

The record shows that Lillian Heaton made desert land entry on April 3, 1896, for the E½ of the SW¼ of Sec. 8, T. 31 N., R. 71 W.,

Douglas, Wyoming, land district. April 29th following Robert J. T. Phifer filed an affidavit of contest alleging that the land is not desert in character; that it contains large deposits of gypsum cement and is more valuable for the same than for agricultural purposes.

A hearing was had before the local officers, and as a result they decided that the SE¼ of the SW¼ of said section contains "a deposit of gypsum cement which is more valuable for its deposit of cement than for agriculture," and recommended that the entry be canceled as to that forty acre tract and that the entrywoman be allowed to make an additional entry of another forty acre tract contiguous to that held by her.

No appeal was taken from this action, but on consideration of the matter, your office, by decision of October 28, 1896, reversed the action below, on the ground however, that "notwithstanding the deposit of gypsum which the evidence shows said land to contain" the land was not mineral in character within the meaning of Sec. 2318 of the Revised Statutes.

Phifer's appeal brings the case before the Department.

The decision of your office and that of the register and receiver find that the land contains a deposit of gypsum, and in this finding of fact the Department concurs.

Under the departmental decision in Pacific Coast Marble Co. *v.* No. Pac. *et al.* (25 L. D., 233) it was held (syllabus):

> Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

The land in question comes clearly within the doctrine announced in that case, and it having been shown that the land is of more value for its mineral deposit than for agricultural purposes it must be held that it is not subject to agricultural entry. (See also Alldritt *v.* No. Pac., 25 L. D., 349; Hayden *v.* Jamison, 26 Id., 373; Florida Central and Peninsular R. R. Co., Id. 600).

Your office judgment is therefore reversed.

Vandeberg *v.* Hastings and Dakota Ry. Co. et al.

Motion for review of departmental decision of March 15, 1898, 26 L. D., 390, denied by Secretary Bliss June 8, 1898.

REPAYMENT—JUDGMENT OF CANCELLATION—TRANSFEREE.

JOHN BIRKHOLZ.

On application for repayment under an entry canceled as speculative in character the applicant will not be permitted to go back of the judgment of cancellation, and show that in fact the entry was not speculative.

Repayment cannot be made to one whose interest is acquired subsequently to the cancellation of the entry.

Secretary Bliss to the Commissioner of the General Land Office, June 8, 1898.

(W. V. D.) (J. L. McC.)

John Birkholz has appealed from the decision of your office dated December 4, 1896, rejecting his application for repayment of the purchase money paid by Carrie O. Severance upon her pre-emption entry for lot 1 of Sec. 13, and the SE ¼ of the SE ¼ and lots 8, 9, and 10 of Sec. 24, T. 153, R. 59, Grand Forks land district, North Dakota.

In this case Miss Severance filed declaratory statement May 31, alleging settlement May 21, 1883. She made her proof April 30, and received cash certificate May 10, 1884. Your office, on June 11, 1886, suspended the entry because the proof did not show continuous residence, and called upon her to state more fully the facts as to her residence. She filed a supplementary affidavit, corroborated by that of one Mr. Mapes. The latter stated that Miss Severance had been employed in his family during the period covered by her entry; that the distance from his house to her claim rendered it impossible for her to stay upon her claim every night; that she was dependent upon him for means of transportation to and from her claim; and that she had resided upon it as much as possible consistent with her other duties. It further appeared that immediately after making proof she left the land and removed to Minnesota. In view of these facts, and others more fully set forth in the decision referred to, your office on September 10, 1886, held the entry for cancellation. Said decision was, upon appeal, affirmed by the Department on June 22, 1888. (L & R. copybook No. 157, page 73.)

A fact not then disclosed, but which appears from the record in the matter of the application for repayment now before the Department, tends to confirm the conclusion that said entry was speculative; to wit: that on May 10, 1884, the date of the receiver's receipt, Miss Severance disposed of the land, by warranty deed, to Emery Mapes.

Said Mapes, on August 1, 1884, mortgaged the land to R. J. Wilson. On November 29, 1887, he mortgaged it to the Farmer's Trust Company. On January 30, 1880, he paid his indebtedness to Wilson, so that the mortgage to the Trust Company was the only claim of record against it. As Mapes failed to pay said company the money borrowed the company bought the land at sheriff's sale on July 15, 1893. The company assigned the certificate of sale to Walter R. Howard, and after the expiration of one year from date of sale, there being no redemption,

the sheriff on July 23, 1894, made a deed of said land to said Howard; who, on January 30, 1896, for and in consideration of the sum of one dollar, executed a quit claim deed of the same to John Birkholz—the applicant for repayment.

Counsel for the appellant alleges that your office decision of December 4, 1896, *supra*, erred "in failing to take into consideration evidence to be found in the record, filed subsequent to the date of cancellation, showing that said entry was not made for speculative purposes"; and requests that the papers "filed in support of the application for the reinstatement of said entry be considered in connection with this application for repayment."

There appears to be no occasion to consider the papers above referred to by counsel for appellant, inasmuch as

on application for repayment under an entry canceled for fraud, the applicant will not be permitted to go back of the judgment of cancellation, and show that in fact there was no fraud (Mary O. Lyman, 24 L. D., 493).

Furthermore, whether fraud existed or not, repayment could not be made to the present applicant, Birkholz, because his purchase was made long subsequently to the cancellation of the entry. (Albert G. Craven, 14 L. D., 140; California Mortgage and Loan Co., 24 L. D., 246; and many other cases.)

The decision of your office is correct, and is hereby affirmed.

APPLICATION FOR SURVEY—ISLAND.

JOSEPH MICHAEL.

An application for the survey of an alleged island in a navigable stream will not be allowed, where it is apparent that the tract in question belongs to the riparian owners.

Secretary Bliss to the Commissioner of the General Land Office, June 9, 1898.

(W. V. D.) (C. W. P.)

With your office letter of May 6, 1898, you transmit the application of Joseph Michael for the survey of an island in the Kansas river, in sections 32 and 33, township 12 south, range 20 east, Kansas.

It appears that notice of this application was duly served upon C. C. James, R. L. French and Mrs. Henrietta Reatz, as owners of the main lands on the banks of the river opposite the island; two of whom—R. L. French and C. C. James—acknowledged service of said notice, but allege no ownership of the island and offer no objection to the survey thereof. But it is stated in an affidavit of the applicant, on page 4 of his application, that Mrs. Reatz "acknowledged service of notice, but refuses to sign the affidavit, claiming a right to said island and legal advice to sign no papers."

An affidavit by Amos Worrill, attached to the application, states

that "the Kansas is a navigable stream beyond the island, and was frequently navigated by steamboats in the early settlement of Kansas," and that "the said island existed at the time of the survey of the township, but has increased in size since the survey."

The plats of the official survey of said township which was made in 1856–1860, show no island on either side of the river in sections 32 and 33. (See photolithographic copies of the plats accompanying your letter.)

The joint affidavit, on page 2 of the application, shows that the island contains about ten acres of land; that the width of the channel on either side between the island and the main shore is one hundred and fifty feet, and the depth thereof at ordinary stages of the water about four feet; that the island is about five or six feet above high water mark, not subject to overflow, and the land fit for agricultural purposes, with no improvements thereon.

Mrs. Reatz has submitted the affidavits of herself and three others, which show that there is a small tract of land or island lying directly north of the Reatz farm which is separated from the main land by high water in certain seasons of the year, and that it is generally known in the community as Reatz's island; and that the Reatz's have always claimed it as part of their land.

Mrs. Reatz, in her affidavit, states that she is the widow of Christian Reatz, who died in 1889; that the island, which is separated from the main land at certain seasons of the year by water, was claimed by her late husband as a part of his land; that during his lifetime he went to great expense to keep the island from damage during high water, consisting of driving piles and filling brush back of said piles, etc.; that since her husband's death, she and her children have resided on said land the greater part of the time, and they are now residing thereon; that from 1870 she and her husband held undisturbed title to the land, which includes said island (except in the seventies there was some trouble, the nature of which she did not know), until March, 1898, when the said Joseph Michael notified her that he owned that part known as the island, and that he is attempting to get possession of the same.

There was also submitted by Mr. Menger, representing Mrs. Reatz and the heirs of C. Reatz, deceased, a certified copy of a judgment of the District Court for the county of Douglas, Kansas, in the case of Christian Reatz *v.* William Black, dated January 19, 1875, in which it was held that the plaintiff is the owner of the southwest fractional quarter of the northwest fractional quarter of Sec. 33, T. 12, R. 20, in Douglas county, Kansas, and that the island in the Kansas river lying directly north of said real estate is a part thereof, and that the plaintiff is the owner of said island.

You recommend that the application for survey be disallowed.

The survey applied for can only be ordered when it clearly appears that the island belongs to the United States; otherwise the Depart-

ment has no jurisdiction, and therefore no power to direct the survey. L. F. Scott, 14 L. D., 433.

It does not sufficiently appear that the alleged island is an island in fact, but the evidence tends to show that the so called island is connected with the main land south of it, except in times of high water. In the affidavit, on page 2 of the application for survey, it is stated that the island contains about ten acres, and in the affidavit of Amos Worrill, attached to the application, it is stated that the island existed at the time of the survey of the township, but has increased in size since the survey.

The Kansas river being navigable (Wood *v.* Fowler, 26 Kansas, 682), and the riparian ownership extending to the banks of the stream (Id.); and the records of your office showing that lots 1 to 4, inclusive, in sections 32 and 33 of said township, were disposed of by the government in 1857 and 1858; and the evidence submitted tending to show that the so called island is connected with the main shore, it would seem that the island belongs to the proprietors of the land on the main shore.

The application for the survey is therefore denied.

APPLICATION TO AMEND AN ENTRY—DEMURRER TO EVIDENCE.

GILES *v.* TROOP (ON REVIEW).

An application to amend an entry by the substitution of certain tracts for others included in said entry, does not in itself operate to render said entry void from the date of such application, or release the lands covered thereby from appropriation.

Where a motion to dismiss, on account of the insufficiency of the evidence, is sustained by the local officers, the entry should not thereafter be canceled without according the defendant an opportunity to submit evidence; and this rule must be observed whether the motion raises a question of law, or one of fact.

Secretary Bliss to the Commissioner of the General Land Office, June 9, 1898.

(W. V. D.) (J. L. McC.)

This Department, by letter of March 11, 1898, entertained a motion, filed by counsel for defendant, for review of departmental decision of December 4, 1897, in the case of A. J. Giles *v.* John D. Troop, involving the SE. ¼ of Sec. 31, T. 11 N., R. 4 E., Oklahoma City land district, O. T., holding that Troop's entry for the land described should be held subject to Giles' right to make entry therefor. (See 25 L. D. 448.)

The facts of this case were very fully set forth in departmental decision heretofore rendered; and only a brief resume thereof will be here necessary.

It will be sufficient to say that the land in controversy was originally covered by the homestead entry of Americus W. Kees; but Kees, on October 3, 1891, applied to amend his entry so that it would cover a different tract.

Troop, the defendant in this case, originally (on September 25, 1891,) made homestead entry for the NE ¼ of Sec. 6, T. 10 N., R. 4 E.; but on October 5, 1891, he applied to amend his entry so that it would cover the tract embraced in Kees' entry (but which Kees had two days previously applied to amend.)

On July 26, 1895 (after many intervening transactions not necessary to set forth in detail), Kees was allowed to amend his entry as prayed for by him; and by your office letter of August 14, 1895, Troop was allowed to amend his entry so that it would cover the land which had thus (nineteen days previously) been released from Kees' entry. Troop's entry was consummated October 31, 1895.

Prior to the last named date, however, to wit: on January 16, 1894, A. J. Giles filed in your office a protest against the allowance of Troop's application to amend; and upon being notified that Troop's application had been allowed, Giles—on September 9, 1895—filed a second protest. In said protests Giles alleged that he had resided upon and improved said land since September 9, 1892, and that Troop had never established residence on the land.

Your office directed that a hearing be had; and March 13, 1896, was the day set for such hearing. Both parties appeared in person and by attorney.

As the result of the hearing, the local officers found for the defendant (Troop), and dismissed the protest. Giles appealed to your office, which affirmed the judgment of the local officers. He then appealed to the Department, which reversed the decision of your office, by the decision which counsel for Troop has now moved to review.

The motion alleges that said departmental decision heretofore rendered was in error for the following reasons (in substance):

(1). In not holding that Kees' application to amend from the tract in controversy to another, necessarily called for the cancellation of his entry for the former; in not holding that said "entry of Kees' for the land involved was, from and after the date he applied to amend from the same, *prima facie* void," and that,

upon said entry being canceled under said proceeding, said cancellation related back and took effect as of the day when said application to amend and disclaimer of right was filed in the local office, to wit: October 3, 1891.

In support of the allegation that Kees' entry from and after the date when he applied to amend from the same was *prima facie* void, the applicant for review cites the departmental decisions in the cases of David P. Litz (3 L. D., 181), and Jeremiah H. Murphy (4 L. D., 467). Said decisions hold that an entry in itself void is no bar to a subsequent legal application—but neither of them contains anything in support of the proposition that the instant an entryman applies to amend his entry such entry becomes void; nor, it may safely be said, can a ruling to such effect be found in any decision of this Department. Kees' entry for the land in controversy being not void, but *prima facie*

valid, was an appropriation of the land covered thereby until actually canceled upon the final determination of his rights. See Graham *v.* Hastings & Dakota Railway Co. (1 L. D., 362); Wolf *v.* Struble (ib., 449); Whitney *v.* Maxwell (2 L. D., 98); Henry Cliff (3 L. D., 216); Carlson *v.* Kries (6 L. D., 152–3); Schrotberger *v.* Arnold (ib., 425); John O'Dea (ib., 819); James A. Forward (8 L. D., 528); Faulkner *v.* Miller (16 L. D., 130); and many others.

Troop can therefore base no claim to the land in controversy upon a "prior record right" by virtue of his application filed October 5, 1891.

The motion for review alleges further:

> The Hon. Secretary erred in holding and finding as a fact that "it is conceded by Troop that he did not live on the tract in controversy from the latter part of the year 1891, until about October 1, 1895, and it does not clearly appear that he ever actually lived thereon," said finding being unsupported by the record, and founded upon the *ex parte* showing of the plaintiff, and being vigorously denied and combated by Troop, and a hearing demanded to rebut the same.

Giles and his witnesses testified positively that Troop had not resided upon the land until October, 1895; Troop introduced no testimony in his own behalf, but filed a demurrer and moved to dismiss the contest on the ground that during the suspension of his entry he was not required to reside on the land. The arguments of Troop's counsel earnestly contended in support of the above proposition. From the testimony showing his continuous absence, from his failure to deny such testimony, from his demurrer, and from the tone of his arguments on file, the inference was drawn that Troop "conceded" that he had failed to reside upon the land; but upon a more careful examination this would appear to have been an error.

The departmental decision heretofore rendered held in effect, that Troop, if he claimed the right of entry on the ground of priority of settlement, must show compliance with the settlement laws, and the establishment and maintenance of residence in good faith from the date of such settlement.

There was no error in this holding.

Finally, the motion alleges that the Department was in error:

> In holding and finding in effect that when a demurrer is sustained to the evidence of the contestant, that upon said demurrer being overruled on appeal the entry should be summarily canceled—the rule being that the contestant is only entitled to a judgment returning the case to the local office to enable the defendant to make his defense, or to show any cause why his entry should not be canceled.

In the local officers' record of proceedings at the hearing it is stated:

> Plaintiff here requests the Hon. Register and Receiver of this office to examine the testimony in this case, and the records, and pass upon the demurrer of the defendant as soon as possible, in order that this case may not be long delayed in the conclusion of the taking of the testimony. . . . In which request for a speedy decision by the register and receiver the defendant joins, states that he has seven witnesses here ready, and, had the plaintiff in his judgment made out a case, he would be at once willing to put in their testimony.

Here is an expressed willingness on the part of the defendant to abide by the decision of the local officers; and it would appear hardly just or equitable that he should lose his case simply because the local officers decided in his favor—by sustaining his demurrer.

The Department has repeatedly held that,

> Where a motion to dismiss, for the want of sufficient evidence, is sustained by the local officers, the entry should not thereafter be canceled without according the defendant an opportunity to submit evidence (Kelly *v.* Butler, 6 L. D., 682, and many other cases).

Counsel for the defendant, however, contends that the above ruling does not apply in the case at bar, for this reason:

> This demurrer does not raise a *question of fact* . . . . (It) was based upon the contention that the fact of Troop's failure to reside on the land was, as a *matter of law*, wholly immaterial and irrelevant . . . . Mr. Troop having rested his case upon the *legal proposition* covered by his demurrer must now abide the result.

In the practice of the Department, however, no such distinction appears to be recognized. (See Bradford *v.* Aleshire, 18 L. D., 78; Hansen *v.* Nilson, 20 L. D., 197; Roberts *v.* Stanford, 22 L. D., 419.)

It is the opinion of the Department, upon further consideration of the case at bar, that its decision of December 4, 1897, was in error in finding that Troop had conceded that he had not resided upon the tract in controversy, and in directing that Troop's entry should be held subject to Gile's right to make entry, without giving Troop an opportunity to introduce evidence in support of his allegation of prior settlement and continuous residence.

Said departmental decision is therefore hereby modified in that particular, and you will return the record to the local office with direction to proceed with the hearing, after notice to both parties, and allow Troop to introduce evidence in support of his claim of prior settlement and continuous residence. The contestant will be allowed to introduce testimony in rebuttal, if he so desires. Upon receipt of the record of such hearing, your office will re-adjudicate the case.

APPLICATION FOR SURVEY—ISLAND.

SPENCER B. NEWBERRY ET AL.

An application for the survey of a small island in a non-navigable lake will be denied, where, under the law of the State in which such island is situated, the applicant is the owner of said island by virtue of his riparian rights.

Secretary Bliss to the Commissioner of the General Land Office, June 9, 1898.

(W. V. D.) (C. W. P.)

April 4, 1898, you submitted the application of Spencer B. Newberry and A. St. J. Newberry, of the city of Cleveland, Ohio, for the survey of two small islands in "Turkey" or "Syracuse" lake, in sections 8 and 9, township 34 north, range 7 east, Indiana.

It appears from the joint affidavit of John Sloan and Edward Miles, of the town of Syracuse, Indiana, attached to the application, that said islands contain about five acres; that the width of the channel on either side between the islands and the main shore is three hundred feet and

the depth thereof at ordinary stages of the water is about two feet; that the islands are about four feet above high water mark, not subject to overflow, and the land fit for agricultural purposes; that the configuration of either shore of the main land has not materially changed since the original survey of the water front on the main land; that the improvements on the islands are as follows: The main line of the Baltimore and Ohio Railroad crosses the larger island; the smaller one has no improvements, and it appears that said improvements were made by the Baltimore and Ohio Railroad Company.

Another affidavit of said Sloan and Miles, also attached to the application, states that applicants for the survey are the proprietors of the lands on the shores opposite the islands sought to be surveyed, and that there are no other coterminous proprietors on whom notice of such survey could be made.

There is no evidence showing that notice of the intention of the applicants to apply for the survey of the islands was served upon the Baltimore and Ohio Railroad Company.

The records in your office show that the lands nearest and opposite the alleged islands were disposed of as follows:

Lot 1, Sec. 8, T. 34 N., R. 7 E., 2 P. M., Indiana, for cash to John Briggs, December 8, 1836; lot 2 of Sec. 8, to Joseph Defus for cash, June 3, 1848. Lots 3 and 4 of section 9 of said township, patented to the State as swamp land under the act of September 28, 1850 (9 Stat., 519), patent No. 1, dated November 1, 1852, so that the parties now in possession obtained title to said lots, through intermediate conveyances, from the government.

The joint affidavit of Samuel and Levi Akers, of said town of Syracuse, Indiana, shows that the two islands were in existence more than fifty years ago and then bore evidence of having existed as long as other adjacent lands around the lake, being covered with large trees, principally oak, of many years growth, so that they must have been in existence at the time the township was originally surveyed. It also appears by said affidavit that the lake is not navigable.

The plat of the official survey of said township (approved February 21, 1835,) shows that the lake was meandered, but shows no island or islands in the locality described in the diagrams accompanying the application (see photolithographic copies of plats accompanying your letter).

You recommend that the application be disallowed.

In the case of Frank Chapman, 6 L. D., 583, an application for the survey of an island containing about nine acres, in a non-navigable river, in the State of Kansas, not indicated on the plat of the survey of the township, was denied, on the ground that *prima facie* the island belongs, under the law of riparian rights, to the proprietors of the land on the nearest main shore opposite said island, and that if it does so belong, to order a survey would be to interfere with vested rights. And in the case of C. W. Beeman, Id. 637, an application for the survey of an island, containing about twenty-three acres, in a non-navigable river in the same State, was denied, it appearing that the appli-

cant for survey was the owner of the main land opposite and nearest to the island, on the ground that the title to the island must be regarded as being in the applicant for the survey as owner of the shore. In the case of John C. Christensen, 25 L. D., 413, on the authority of the case of the Grand Rapids and Indiana Railroad Company, 159 U. S., 87, a survey was denied of a small island in a meandered non-navigable river, shown on the plat of official survey to be in existence at the time of the original survey, where the right of the riparian owners to the bed of the river was recognized by the State in which the land was situated. See also the case of Diedrick C. Glissman, Id., 474.

It appears to be the general rule in Indiana that the owner of land on a non-navigable lake is the owner of the bed of such lake to the thread thereof. Ridgway *v.* Ludlow, 58 Indiana, 248. But in the case of Stoner *v.* Rice, 121 Indiana, 37, it was held that the owner of land bordering on a non-navigable lake, such as the one described in that case (almost circular in form), where the subdivisions of the land were surveyed by running a meandered line between the dry land and the water to ascertain the number of acres of dry land, and designating such subdivision as a fractional quarter of a lot, giving the number of acres of dry land, took the title to all the land contained within the subdivision, as riparian owner, and that his title included, and that he owned, the land beneath the lake far enough beyond the meandered line and water's edge to make out the full subdivision in which his land was so situated, a rule which in the case under consideration would give the applicant, as the owner of the two shores opposite the islands in question, the whole of the lake bottom.

There seems to be no reason why these principles are not applicable to the case under consideration. The application for the survey is accordingly denied.

OFFERED AND UNOFFERED LANDS—ACT OF MAY 18, 1898.

CIRCULAR.

Commissioner Hermann to registers and receivers, U. S. Land Offices, June 10, 1898.

Your attention is called to the provisions of section 1, of the act of Congress approved May 18, 1898 (Public No. 102), entitled "An act to abolish the distinction between offered and unoffered lands, and for other purposes," which read as follows:

> That in cases arising from and after the passage of this act the distinction now obtaining in the statutes between offered and unoffered lands shall no longer be made in passing upon subsisting pre-emption claims, in disposing of the public lands under the homestead laws, and under the timber and stone law of June third, eighteen hundred and seventy-eight, as extended by the Act of August fourth, eighteen hundred and ninety-two, but in all such cases hereafter arising the land in question shall be treated as unoffered, without regard to whether it may have actually been at some time offered or not.

The instructions on pp. 222 to 227, of the circular of October 30, 1895,

which pertain to unoffered lands will be a sufficient guide for preemption cases arising under this section of the act.

No change in the instructions already in force under the homestead law seems to be necessary, further than to state that under said act all lands will be regarded as unoffered in computing the time within which homestead settlers are required to put their claims of record by entry at the proper district land office.

The instructions on pp. 44 to 46 circular of October 30, 1895, will be followed in cases arising from and after the passage of this act under the timber and stone law of June 3, 1878 (20 Stat., 89), and the act of August 4, 1892 (27 Stat., 348), except as modified by the provisions of said section one.

Approved,

C. N. BLISS, *Secretary.*

OFFERED AND UNOFFERED LANDS IN MISSOURI.

CIRCULAR.

Commissioner Hermann to registers and receivers in the State of Missouri, June 10, 1898.

Your attention is called to the provisions of section 2, of the act of Congress approved May 18, 1898 (Public No. 102), entitled "An Act To abolish the distinction between offered and unoffered lands, and for other purposes," which read as follows:

That all public lands within the State of Missouri shall hereafter be subject to dispcsal at private sale in the manner now provided by law for the sale of lands which have been publicly offered for sale, whether such lands have ever been offered at public sale or not: *Provided,* That the actual settlers shall have a preference right, under such rules and regulations as the Secretary of the Interior may prescribe.

In all applications to purchase land at private sale made after the passage of this act, the applicant must furnish a duly corroborated affidavit showing that there is no one other than himself claiming said land as an actual settler. In other respects you will take action under existing regulations, treating all public lands as unoffered.

Approved,

C. N. BLISS,

Secretary.

APPLICATION FOR SURVEY—ISLAND.

WILLIAM KUHLMANN.

An application for the survey of an island in a meandered non-navigable river may be allowed where it is apparent that said island was improperly omitted from the official survey.

Secretary Bliss to the Commissioner of the General Land Office, June 9, 1898.

(W. V. D.) (C. W. P.)

With your office letter of April 29, 1898, you transmit the application of William Kuhlmann, of Merrick county, Nebraska, for the survey of

an island in the Platte river, in sections 1 and 2, township 11 north, range 8 west, Nebraska, in which he stated that said island has never been surveyed by the United States government; that he is desirous that the same may be surveyed in order that it may be brought into market for disposal according to the laws of Congress and the regulations of the General Land Office relative to the disposal of land embraced in fragmentary surveys.

It is shown by the application and the affidavits of Edom Stot and A. P. Beman, transmitted with the application, that this island contains about one hundred acres of land; that it existed at the time of the government survey and prior thereto, approximately of the same dimensions and form as at present; that the width of the channel between the island and the main shore is seventy yards on the north side and about three-quarters of a mile on the south side; that the depth of the waters at ordinary stages is about two feet, and that the island is about three feet above high water mark, not subject to overflow, and fit for agricultural purposes; that no improvements have been made upon the island and that it is not occupied or claimed by any one.

It appears that notice of this application for survey was duly served upon N. Beman and J. G. Steinback, the owners of the lands on the main shores opposite the island, and that they acknowledged the service of said notice, but allege no ownership of the island, nor do they offer any objection to the survey of the same.

It is stated, in a letter from A. A. Hoehling, junior, attorney for the Union Pacific Railway Company, who transmitted said application to you, dated December 18, 1897, that a portion of the island in section 1 falls within the limits of the grant to the Union Pacific Railway Company, under the acts of 1862 and 1864 (12 Stat., 489, and 13 Stat., 356), and that it is desired by said company that a government survey of the island be made, to the end that the necessary steps be taken by the company to obtain a patent for the same.

The official plats of the survey of said township, which was made in 1865 and 1866, show that the river was meandered, but show no island in the locality described (see photolithographic copies of plat accompanying your office letter).

It appears that the Platte river in Nebraska is not navigable; that it is a wide shallow stream, enclosing many islands and has a small volume of water compared with its length; that the water is so shallow and the channel so shifting that it is not navigable even for small vessels. (Lippincott's Gazetteer, edition of 1880, page 1762.)

It is stated in your office letter that the records of your office show that the lands opposite and nearest the island in the surveys north of the main channel of the Platte River were disposed of as follows:

Fractional section 1 containing 61.00 acres approved to the Union Pacific Railway Company January 11, 1871.

The SW. ¼ of the NE. ¼ and lot 1, section 2, containing 74.75 acres, is embraced in the homestead entry, No. 8402, of Fred. Beberniss, of February 10, 1879. Final certificate No. 5679, dated July 12, 1884.

Lots 2 and 3, section 2, containing 88.50 acres, are included in the homestead entry of August Beberniss, dated January 12, 1880. Final certificate, No. 6175, dated February 25, 1885.

You recommend that the application for survey be disallowed, and cite the cases of John C. Christensen, 25 L. D., 413, and Grand Rapids and Indiana Railroad Company *v.* Butler, 159 U. S., 87.

In the case of John C. Christensen, *supra*, a survey was denied of a small island in a meandered, non-navigable river shown by the official plat of survey to be in existence at the date of the survey of the township embracing the same, where the right of the riparian owners to the bed of the river is recognized by the State in which the land lies, and in the later case of Diedrick C. Glissman, 25 L. D., 474, where the facts are essentially the same as those in Christensen's case, the application for survey was denied. The applications for survey in these cases were denied upon the authority of the case of Grand Rapids and Indiana Railroad Company *v.* Butler, *supra*, in which case the title to an island, containing 2.56 acres of land, was involved. There had been two surveys of the township, comprising the land in dispute, one in 1831, and another in 1837, in neither of which was any island meandered or surveyed on the site of the island in dispute, and not until 1855 was said island surveyed and marked on the plat of survey Island No. 5. The supreme court held that the only inference that could be drawn from the facts of the case was that the government agents, its surveyors, in 1831 and 1837 did not consider the land of sufficient value to survey; that there was nothing to indicate mistake or fraud, and that as in Michigan a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the centre of the thread, the supreme court of Michigan was right in holding that whatever there was of this conformation passed under the grant to Lyons and Hastings.

In the case under consideration the island is shown to be of considerable area, and to have been in existence, substantially in its present condition, at the time of the survey of the township, but the official plat indicates no island thereon in the locality represented on the diagram sent with the application. It is also shown that the island is unoccupied and without improvements. And the owners of the lands on the adjacent banks of the river have acknowledged notice of the application for survey, but offer no objection thereto.

It is a clear inference from these facts, which are not disputed, that this island was improperly omitted from the official survey, and the application should be allowed. See the case of Archie G. Palmer, 26 L. D., 24.

For these reasons a survey is hereby ordered.

HOMESTEAD ENTRY—AMENDMENT.

STONEWALL J. MARTIN.

Where, through a mistake made in the description of the lands intended to be entered, an entryman fails to secure the land selected by him, and a part of the lands so intended to be taken is included in the intervening entry of another, he may be permitted to amend his entry by substituting for the tracts entered so much of the lands intended to be taken as remains open to entry, and make up the remainder from adjacent unappropriated land.

Secretary Bliss to the Commissioner of the General Land Office, June 10, 1898.

(W. V. D.) (E. B., Jr.)

On June 24, 1896, Stonewall J. Martin applied to amend his homestead entry No. 3200, made November 4, 1895, for the S. ½ of the NW. ¼, section 20, and the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼, section 19, T 26 N., R. 76 W., Cheyenne, Wyoming, land district, so as to embrace in lieu thereof the W. ½ of the NW. ¼ and the NE ¼ of the NW. ¼, section 20, and the SE. ¼ of the SW. ¼, Sec. 17, in same numbered township, but in range 73 west. Your office decision of August 25, 1896, denied Martin's application, notwithstanding the favorable recommendation of the local office, because it "is not for the tracts originally selected," but held, at the same time, that he might relinquish the land described in his entry and make a new application for the tract as above described in range 73. From this decision Martin has duly appealed—

for the reason that said decision is contrary to law and the rulings of the General Land Office. Secs. 2369–2372 R. S. U. S., and page 118 Circular Gen'l Land Office issued Oct. 30, 1895.

It appears from evidence filed with the application to amend, that Martin did not intend to enter land in range 76; that he intended to enter a tract in range 73 which corresponds to the one in range 76 as described in his entry papers; that the mistake in description was due to the fact that the surveyor who aided him in making his selection gave him the wrong range number, and that it was not made through any fault of his. It also appears from the records of your office that the land in section 19, range 73, which Martin selected and intended to include in his entry, is now embraced in the homestead entry, No. 3205, of William O. Newell, made November 12, 1895, but that none of the land in section 20, range 73, nor the forty acre tract in said section 17 which Martin now desires to take, has been appropriated. The S. ½ of the NW. ¼ of said section 20, range 73, which was originally selected by Martin but misdescribed through no fault of his, is still open to entry; but he can not take the land in section 19, which he also originally selected, because it is embraced in the apparently valid subsisting homestead entry of Newell.

The Department sees no reason why, in view of the facts and the law applicable thereto, Martin may not be allowed to amend his entry so as to take the land in said section 20, range 73, which he originally

selected, that is, the S. ½ of the NW. ¼ thereof, and the NE. ¼ of the NW. ¼ of the same section and either of the other forties embraced in his application to amend. Section 2372 Revised Statutes, as heretofore construed by the Department (See Cawood *v.* Dumas, 25 L. D., 526), seems to cover the case at bar and furnish ample authority for the allowance of such amendment. It is evidently the intendment of that section that the party amending his entry thereunder shall take the land he intended to enter if that is still open to entry, but, if it is not, then such other land as is open to entry. Here part of the land intended to be entered is open to entry, and the other part adversely appropriated. It follows that Martin may take so much of the land he intended to enter as is unappropriated, and make up the balance of the homestead allowance from adjacent unappropriated land. In this connection see case of Harriet A. Babcock, 21 L. D., 265. There is such disparity of facts between the case at bar and the case of L. A. Dorrington (14 L. D., 564), cited in your office decision, as to render the citation inapplicable.

The decision of your office is reversed. You will allow Martin to to amend his entry in accordance with the views herein expressed.

SIOUX INDIAN LANDS—COMMUTATION—PRICE OF LAND.

RANDALL MCDONNALL.

On the commutation of a homestead entry of Sioux Indian lands, restored to the public domain under the act of March 2, 1889, the entryman must pay the minimum price for the land, in addition to the payments required under said act of 1889.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 13, 1898.* (J. L. McC.)

Randall McDonnall, on January 8, 1894, made homestead entry for the N. ½ of the NE. ¼ and N. ½ of the NW. ¼ of Sec. 22, T. 1 N., R. 21 E., Chamberlain land district, South Dakota.

Said land is within that portion of the Great Sioux Reservation that was ordered to be restored to the public domain (upon due proclamation) by Secs. 21 and 28 of the act of March 2, 1889 (25 Stat., 888).

Said Sec. 21 provides that the price paid for said lands shall be—

> The sum of one dollar and twenty-five cents per acre for all the lands disposed of within the first three years after the taking effect of this act, and the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter, and fifty cents per acre for the residue of the lands then undisposed of.

In the case at bar, McDonnall paid for the land entered by him in accordance with the act above cited. Upon his applying to commute said entry to cash, your office demanded of him one dollar and twenty-five cents per acre additional. McDonnall contends that such demand is unauthorized by law and appeals to the Department.

The Department, on May 13, 1896, rendered a decision (State of South Dakota, 22 L. D., 550) covering this case. Said decision discussed at length the provisions of said Sec. 21 of the act of March 2, 1889, in connection with those of Sec. 6 of the act of March 3, 1891 (26 Stat., 1095–1098), the latter of which permits commutation after the expiration of fourteen calendar months from the date of entry, but specifically provides:

> The provsion of this section shall apply to lands on the ceded portion of the Sioux reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but *shall not relieve said settlers from any payments now required by law.*

In view of the statutory provision last above quoted, said departmental decision held (page 556):

> This provision clearly recognizes the trust character of the payments originally required of entrymen of Sioux lands, and means that, when such entrymen so elect, they may commute, after the time named, by paying the minimum price for the land, *in addition to the payments required under the act of 1889.*

The decision of your office appealed from is correct, and is hereby affirmed.

PRACTICE—MOTION FOR A REHEARING.

CUNNINGHAM *v.* SAPPINGTON.

Matters arising subsequently to the initiation of a contest do not furnish proper grounds for a rehearing therein, but should be presented in a new and independent proceeding.

Secretary Bliss to the Commissioner of the General Land Office, June 14, 1898.

(W. V. D.) (P. J. C.)

March 29, 1898, the Department denied Sappington's motion for a rehearing in the above entitled case, involving the NW. ¼ of Sec. 26, T. 26 N., R. 2 E., Perry, Oklahoma, land district, (26 L. D., 441). The ground of that motion was newly discovered testimony to the effect that one C. M. Flora, who was originally a party to the contest against the land, had entered into an agreement with Cunningham that he—Flora—should withdraw from the contest and Cunningham should prosecute the same, and if successful, the land should be divided between them; that Flora was to contribute to the expenses of Cunningham in the contest and that he did pay a part of the costs incurred therein. From some affidavits that appeared in the record of the original case, it was determined that the showing made was not sufficient to warrant the action prayed for, and the motion was denied.

Sappington has now filed another motion for rehearing, and asks that it be accepted as a substitute for the former one, in which, together with the affidavits in support thereof, the objections to the former motion and affidavits seem to have been overcome.

It is not deemed necessary to discuss the merits of the present motion

for the reason that it is not considered, granting for the sake of argument that a cause of contest is stated, that a rehearing should be allowed. The question that is now raised is not one of disqualification of Cunningham to make an entry, as insisted, but, is whether the entry he has made is a legal one in view of the charge that he had entered into a contract to divide the particular land with some one else, and did not enter it for his own use and benefit. This question is not germane to that upon which the former contest was based and tried. The matters relied upon in this motion were not in existence at the time the former contest was initiated, but have originated since. The question in that case was as to who was the prior settler on the land. Cunningham was successful, Sappington's entry canceled and Cunningham made his entry. It is the legality of this entry that is attacked and it is held that this should be attacked by an original and independent proceeding and not by a rehearing in the old case.

The motion is therefore denied.

OKLAHOMA LANDS—DISQUALIFICATION OF ENTRYMAN.

ROBERTSON *v.* PHILLIPS.

Advantage gained by repeatedly passing through the territory on a railroad train during the prohibited period, such trips being for the purpose of locating a desirable tract, operates to disqualify the entryman.

Secretary Bliss to the Commissioner of the General Land Office, June 15, 1898.
(W. V. D.) (L. L. B.)

Sometime in the afternoon of September 16, 1893, Granvil C. Phillips filed in the Enid, Oklahoma, land office his soldiers' homestead declaratory statement for the SW. ¼ of Sec. 22, T. 27 N., R. 5 W.

Ten days later William S. Robertson made homestead entry for the same land.

January 24, 1894, Phillips made entry for the same in pursuance of his said declaration.

March 1, 1894, Robertson brought contest against Phillips' entry, alleging that his settlement was prior to the filing of Phillips' declaratory statement. Hearing was commenced December 4, 1894.

January 11, 1896, the register and receiver found that Robertson had the prior right to the land by reason of his settlement, and recommended that the entry of Phillips be canceled.

On appeal, your office, by decision of August 27, 1896, affirmed the action of the local office on the ground that

Phillips was within the Cherokee Outlet during the prohibited period and took advantage of such presence to select the land in question.

Phillips' appeal brings the case before the Department.

Some points of practice were raised at the hearing, and discussed in

the decision appealed from, which it is not thought necessary to consider, inasmuch as the record presented shows that Phillips is disqualified from claiming land in the Cherokee Outlet by reason of having violated the proclamation of the President opening the same to settlement and entry.

Following is his testimony on this point:

Q. How frequently did you cross the Cherokee Outlet on the R. R. between the 3d of March, 1893, and the day of the opening?—A. Probably I crossed it between the 10th and 16th two or three trips, going up and down.

Q. Was you acting as conductor then?—A. No sir.

Q. What was the occasion of your making those trips?—A. I was making preparations to take a homestead.

* * * * * * *

Q. On these several trips that you made across the Strip between the 11th and 16th days of Sept., 1893, did you cross any time in the day time?—A. Yes sir, I think I did.

Q. How many times in the daytime?—A. I think the most of them were in the day time, or part of them anyway.

Q. How close is the tract of land involved in this contest to the right of way of the R. I. R. R.?—A. I never measured it, but to the best of my judgment it is between 100 and 200 yards to the corner.

Q. How close is it to the station at Medford?—A. It is, I should judge, about a quarter of a mile.

Q. The station at Medford had been established before the Strip opened had it not?—A. Yes sir.

Q. Can this tract of land be seen from the R. R.?—A. Yes sir.

Q. Passing by, had you ever looked over, or in any way inspected this tract of land?—A. Yes sir, I had.

Q. When did you first determine to try to make entry for this tract of land?—A. I can't tell exactly, but it was before the opening; I was in conversation with one of our attorneys of the R. I. Company—I forget his name now—and he advised me to get a claim next to Medford, as that was the center of the county and would make a good place.

Q. Had you looked over this tract of land from the railway track with a view to filing upon this particular tract?—A. I did; I looked over it from the train and judged that was as pretty a place as I could get.

Q. And then determined to try to get an entry upon that tract of land, did you?—A. Yes sir.

Q. And that was before the day of the opening?—A. Yes sir.

Q. And after the 19th day of August, 1893?—A. Yes sir.

Q. Now, as a matter of fact, did you not make these trips across the Territory for the purpose of inspecting the lands along the track and selecting a place to file on?—A. Probably that was one view I had in going over in the day time or trying to go over in the day time, as I passed through into Hennessey.

Q. And in so going through, you did look out and select this particular tract of land?—A. Yes sir.

The foregoing was brought out on cross examination, and on re-direct examination, after saying that he did not know the lines of the tract when he examined it from the cars, but "picked it out as being near the center of the county and sloping from the townsite, and that it would make a nice home," he was again cross examined as follows:

Q. When did you first learn the number of this tract of land?—A. I learned them from the blue print or map that I got in Topeka.

Q. And it was the information that you obtained from observations made, in passing over the railway, near this land, on the trips that you have referred to, that enabled you to file your declaratory statement for this particular tract of land without first going upon it, was it not?—A. That and being advised by one of our attorneys that Medford would be a good town on account of its being the center of the county.

Q. You wouldn't have taken this attorney's advice if the tract of land, on inspection, had not suited you, would you?—A. If I hadn't thought I would have been suited I wouldn't have made filing.

Q. Did you have that map with you as you passed back and forth through the Strip?—A. Yes sir.

Q. You picked out the quarter on the map and then looked at it as you went by?—A. Yes sir.

Q. And as a result of those observations resolved to take it, and filed upon it?—A. And from the advice I received.

Q. Do you mean to say by that answer that as a result of that observation and the advice given you, you resolved to file upon it?—A. And to make it a home; yes sir.

Re-re-direct:

Q. You may state what the map you refer to in your answer was?—what kind of a map?—A. I don't know any other name, more than it is a blue print gotten up by the R. I. R. R. Company for their line through the Strip, and the land adjoining it.

Q. It was just an ordinary blue print, was it not, with the sections marked along the line of the R. I. R. R.?—A. Yes sir; I got it at the civil engineer's office, at Topeka.

Q. It was not marked in quarter sections, was it?—A. I think not; I think the sections were only given.

Two days later, it being the day on which the oral testimony was closed, he was recalled by his counsel for the purpose of making some corrections in his testimony, and testified as follows:

Q. You say that there are some corrections you desire to make in your testimony before signing?—A. Yes sir.

Q. You may now go ahead and call attention to the particular portions of your testimony that you desire to correct and give the pages from the record, that the questions or answers appear that you desire to correct.—A. At the bottom of page 38: Q. "And in so going through, you did look out and select this particular tract of land?"—A. "Yes sir"; I wish to change the answer "No sir; I selected and obtained the numbers from a map."

On page 42: Q. "And it was the information you obtained from observation made in passing over the railway, near this land, on the trips that you have referred to, that enabled you to file your declaratory statement for this particular tract of land, without first going on it; was it not?"—A. "That, and being advised by one of our attorneys that Medford would be a good town, on account of its being the center of the county"; also the question on the same page—"And as a result of these observations, resolved to take it, and filed upon it?"—A. "And from the advice I received." Also the question following: "Do you mean to say by that answer that as a result of that observation and the advice given you, you resolved to file upon it?"—A. "And to make it a home; yes sir."

These last three questions I want to say, that at the time I answered them I did not understand the purport or meaning of them; I made the selection of the land from general observation, or sight, and from this map, which I had with me, during that time, and while at the land office; I want to say that I had other selections made in case I failed to get filing on this land; I had these selections, as with the selection of the land I filed on, in my mind, so as to enable me to procure a homestead, and better my condition in life.

On page 38: "Passing by, had you ever looked over, or in any way inspected that

tract of land?"—A. "Yes sir." I wish to change that answer: "that I never inspected, except by general view from the train." The question on the same page: "Had you ever looked over this tract of land from the R. R. track with a view of filing on this particular tract?"—A. "I did; I looked over from the train and judged it was as pretty a place as I could get." I wish that to be understood that this is given as my opinion at that time, only.

From this it clearly appears that he received the information that enabled him to make entry of this land from being in the territory at a time prohibited by the proclamation. It was to prevent just such an advantage as Phillips gained, that the prohibition against entrance into the territory was made. The information so obtained by him in violation of law was of equal advantage to that gained by one who made the race after having first gone in at a prohibited time and selected and located the land he designed to and did run for. It guided the entryman on the records as it guided the runner in his race. It enabled the filer to select his claim understandingly on the record, just as it enabled the runner to guide his course to the tract he had unlawfully selected for settlement, with this difference, that while the rider in his haste might lose his way or miss his direction, the entryman was guided with mathematical precision to the coveted quarter section.

The examination and selection of the desired tract is, of necessity, a part of the act of entering upon the same. (Faull *v.* Lexington Townsite, 15 L. D., 389.)

While this Department has held that the mere riding through the territory on the cars during the prohibited period was not such an entry upon the land as would disqualify the person so passing through, yet when it is shown that such trips were repeated for the main purpose of locating a desirable tract for entry, and that the passenger had provided himself with a map showing the sections, and so availed himself of the opportunity thus afforded of getting an advantage over other settlers and entrymen who obeyed the mandate, it can not with reason be held that he stands in the attitude of one who innocently or inadvertently passes over the inhibited territory and who neither seeks nor obtains an advantage thereby.

The Department being clearly of the opinion that Phillips is shown to be disqualified from making entry of the land in dispute, it is not necessary to consider the question of priority of claim of the litigants.

The decision appealed from, in so far as it holds the entry of Phillips for cancellation, is affirmed, and his said entry is ordered to be canceled, and the homestead entry of Robertson having been excluded by the entry of Phillips, will be reinstated.

RAILROAD GRANT—INDEMNITY SELECTION—APPROXIMATION.

DAVIS *v.* NORTHERN PACIFIC R. R. CO.

The occupancy of a tract in connection with settlement and residence upon adjoining land operates to exclude such tract from indemnity selection.

The rule of approximation will not be enforced when it will deprive the entryman of his improvements, and the difference between the excess and the deficiency is but slight.

Secretary Bliss to the Commissioner of the General Land Office, June 15, 1898.

(W. V. D.) (G. R. O.)

The record in the case shows the following facts:

Lots 7 and 11 of section 15, T. 12 N., R. 8 E., Vancouver, Washington, are within the indemnity limits of the grant to the Northern Pacific Railroad Company.

This land was surveyed in 1889. On October 27, 1891, the Northern Pacific Railroad Company filed indemnity list No. 41, including said tracts. This selection was rejected by the local officers for conflict with pending claims, and an appeal was taken. On March 9, 1892, Levi A. Davis applied to make homestead entry of the tracts, together with the S. ½ of the NE. ¼, the SE. ¼ of the NW. ¼, and lot 1 of section 16. His application was rejected by the local officers for conflict with the pending selection of the railroad company, and because there was too great an excess in area over one hundred and sixty acres. He appealed to your office, which, by letter of July 30, 1894, ordered a hearing to determine whether said land was subject to the rights of the company.

The testimony shows that Davis, in 1886, settled upon land which, when surveyed, proved to be the S. ½ of the NE. ¼, the SE. ¼ of the NW. ¼, and lot 1 of Sec. 16, and lots 7 and 11 of Sec. 15, T. 12 N., R. 8 E. He made his home upon and improved said land from that time up to the date of hearing, with the intention of entering it under the homestead laws. His dwelling house and other buildings were upon the land in section 16. Upon said lot 7 the improvements made by him consist of about five acres cleared, grubbed and fenced, and cultivated continuously up to the date of hearing. He has made no improvements upon said lot 11.

It is contended by counsel for the railroad company that there are not enough vacant lands in the odd-numbered sections within the indemnity limits to satisfy the losses existing in the grant at date of definite location, and that, consequently, all the lands within said limits were appropriated and reserved from that date by force of the statute, to indemnify the company for such losses. It has not, however, been determined that such a deficiency of indemnity lands exists. The occupation of said lot 7 by Davis, in connection with his settlement and residence on the adjoining land in section 16, was a bar to the com-

pany's application to select, and the ruling of your office in that respect was correct. It appears, however, that Davis has never occupied or improved any portion of said lot 11. The fact that he intended to include it in his homestead entry can not, in the absence of some act of settlement on his part, reserve it from the company's right to select it as indemnity. The company's selection of said lot 11 may, therefore, be approved, if there is no other objection thereto.

Counsel for the railroad company contend, further, that as the land included in Davis' application embraces more than one hundred and sixty acres, the rule of approximation stated in the case of Henry C. Tingley (8 L. D., 205) should be applied, and that Davis should be required to eliminate the lots in dispute from his application. It was held, however, in the case of Joseph C. Herrick (14 L. D., 222, syllabus):

The rule of approximation will not be enforced when it operates to deprive the entryman of his improvements, and the difference between the excess and the deficiency is but slight.

In the present case lot 11 contains 1.55 acres and lot 7 contains 17.30 acres. After eliminating lot 11 the entry will contain 169.45 acres, or an excess of 9.45 acres over the one hundred and sixty allowed by law. By eliminating lot 7 the deficiency would be 7.85 acres. The difference between the excess and the deficiency is thus only 1.60 acres, while Davis has improvements upon lot 7 which are of the value of at least one hundred dollars. Under the circumstances the rule of approximation will not be applied to this case and Davis will be allowed to include said lot 7 in his homestead application.

Your decision is modified as stated above.

PUBLIC SURVEYS—RETRACEMENT—RESURVEY.

CIRCULAR.

Commissioner Hermann to United States Surveyors-General, June 15, 1898.

On page 224 of the 1894 Manual of Surveying Instructions, it is stated as follows:

If it becomes necessary to retrace any of the exterior lines in order to properly close their lines of survey it must be done at the deputy's own expense as a legitimate contingent in executing the contract.

The construction to be put upon this paragraph is to the effect that deputies when closing their lines upon old work should not expect and will not be allowed compensation for running over the lines previously established, when it is done for the purpose of identifying and locating corners upon which they are instructed to close, or from which they are instructed to initiate their surveys.

The paragraph is not intended to disallow compensation for retracements made for the purpose of accounting for *connections and closings* upon previously surveyed lines, and for the purpose of vindicating the

distances and bearings of these connecting and closing lines in cases where the *absence* of such showing would be considered by this office to indicate a failure on the part of the deputy to conform his work to the requirements of the Manual.

For example, suppose the deputy is required to establish the N. W. and S. boundaries of section 13, the range line having been previously established and accepted, and his latitudinal lines differ in length more than the limit allowed by the Manual; it will be the duty of the deputy to retrace the E. boundary of this section and note the alinement in order to explain this excess of difference.

In the same manner an excess of *closing* on this east boundary when running the latitudinal lines of said section will have to be accounted for by a *remeasurement* of the said boundary.

In cases of closings upon previous work in the interior of a township, the deputy often finds that his lines show an excess over limits of several chains in alinement and measurement on opposite sides of a section. His duty in such cases is to re-run the section boundaries adjoining his work to locate the error and re-set corners if found dilapidated or insufficiently witnessed. If no error in excess of limits is discovered, payment will not be allowed for the reason that the deputy's own work will thus inferentially be shown defective. He is not required to re-run lines beyond those of the adjoining section.

In another example: Suppose the deputy in subdividing a township, the N. boundary of which is already accepted, and the adjoining township on the north subdivided and accepted, finds the lengths of his closing lines in the north tier, and the distances on the north boundaries of the sections of this tier to be in excess of limits, he should retrace and remeasure the north boundary of township and report the measurements re-establishing dilapidated, and defective corner monuments at the time. If the line as re-run by him prove to be within limits, he will not be paid for the resurvey, but if the line be out of limits, he is entitled to compensation therefor.

Deputies will also be instructed that in any case of finding a misclosure, in connecting new surveys with accepted surveys, the presumption is in favor of the correctness of accepted work instead of the new lines being run, provided no evidence to the contrary exists. A single trial or random line by the last deputy cannot be held to discredit the connected system of work previously accepted under a previous contract. Hence a deputy must first retrace and examine those of his own lines liable to contain the error which caused said misclosure. If he then finds his own work accurate, and is willing to abide by the result of an inspection thereof, he is required to retrace the older line in which he suspects error, and justify his own work by showing the true condition.

This principle is the basis of the first paragraph on page 53 of the Manual, and is a condition precedent to the retracements treated of in this circular.

In cases where the deputy is subdividing a township the boundaries of which are entirely or partly obliterated, and he cannot in closing thereon identify or locate some of the corners, he should re-establish the line in accordance with the rules laid down in the Manual, pages 72, 73, and 74. Other cases are treated of in these pages in which deputies will be governed by the directions therein given. It is not necessary to make suppositious cases of every variety of circumstances which the deputy is liable to encounter. It is sufficient to state that retracements and resurveys not specifically provided for in the deputy's special instructions, which are deemed by the deputy to be necessary to make a *consistent showing of his work* (this office to *decide* as to the necessity thereof when finally passing upon the work) and retracements and resurveys found necessary by reason of *obliteration* will be paid for, satisfactory evidence being required in all cases that they *were* necessary.

These retracements must be corroborated by the examiner before the deputy will be allowed compensation, and retracements thus made, as well as resurveys, will be noted in the data furnished by surveyors general to the examiners when starting for the field inspection, and the latter will be required to examine each mile or portion of a mile of such retracements in order to verify the work done by the deputy for which he asks compensation.

When the special instructions accompanying the contract specifying that *certain lines* of old surveys are to be re-established, resurveyed, or retraced if certain conditions be met with, and such work is performed in compliance therewith, there will be no question as to the compensation therefor.

You are further directed to notify deputies that retracements made for the purpose of accounting for connections and closings made on lines of old surveys, and to justify the length and bearing of connection and closing lines, where the absence of such would indicate failure to conform to the requirements of the Manual, will be paid for at the minimum rate per mile named in their contracts for the class of lines retraced (base lines, standard lines, and guide meridians, being classed as township lines, as the Manual does not require that such lines when retraced be doubly chained in any instance), provided the re-establishments, resurveys and retracements stated in his notes are corroborated by the field examiner.

For re-establishments and resurveys (those which involve the establishment of corners), the deputy will be paid at the rates per mile named in his contract for the class and character of lines re-established or resurveyed.

In restoring lost or obliterated corners the deputy will, when it is applicable, follow the pamphlet instructions for "Restoration of Lost or Obliterated Corners and Subdivision of Sections," issued by the General Land Office October 16, 1896 (23 L. D., 361), a copy of which accompanies the Manual now in his possession.

Notes of re-establishments, resurveys, and retracements will be *full* notes in every particular, and they will be incorporated in a book by themselves. The title page thereof will clearly state as usual, the surveys made, when and by whom, and under what authority. Following the index, will be an affidavit by the deputy explanatory of the lines so re-established, resurveyed, or retraced, and setting forth the absolute necessity therefor. Following this affidavit will be the usual preliminary oaths of assistants covering the retracements or resurveys. Then will follow the notes of said surveys.

In all cases of retracements and resurveys the deputy will append a table of latitudes and departures showing that the exterior lines limiting his work close within allowable limits of error.

Following the notes, the usual final oath of the deputy and his assistants will be inserted. They will cover the resurveys only.

BINGER HERMANN,
Commissioner.

DEPARTMENT OF THE INTERIOR,
June 15, 1898.

The foregoing instructions are hereby approved, and authority is hereby given the Commissioner of the General Land Office to direct the surveyors general to attach the same to the special instructions to deputy surveyors accompanying each contract for the survey of public lands, the same to form a part of such special instructions.

C. N. BLISS,
Secretary.

JUANITA LODE.

Motion for review of departmental decision of May 5, 1898, 26 L. D., 608, denied by Acting Secretary Ryan, June 20, 1898.

ABANDONED MILITARY RESERVATION—ACCRETION—SCRIP LOCATION.

R. M. SNYDER.

Accretions to an island reserved for military purposes become in fact and in law a part of such reservation, subject to disposition under the act of July 5, 1884, on the abandonment of said reservation.

The act of July 5, 1884, for the disposal of abandoned military reservations, does not contemplate the restoration of such lands to the public domain for general disposition under the public land laws, but provides that such lands shall be disposed of in a special manner, and thereby takes them out of the class of lands subject to location with Porterfield scrip.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 20, 1898.* (G. B. G.)

R. M. Snyder has appealed from your office decision of August 10, 1896, rejecting his application made at Booneville, Missouri, May 15,

1896, to locate Porterfield scrip No. 100, for lot 1, Sec. 28, T. 50 N., R. 33 W., upon the ground that said tract of land had been embraced in an abandoned military reservation, and is only subject to disposal under the provisions of the act of Congress, approved July 5, 1884.

In the decision appealed from it was said:

> It appears from the records of this office that said tract of land is a part of an island which was reserved by executive order of March 10, 1865, for military purposes, and that the said reservation was, on July 22, 1884, turned over to this department for disposal under the act of July 5, 1884 (23 Stat., 103), which provides that the Secretary of the Interior shall cause the said lands to be appraised and sold at public sale to the highest bidder for cash, at not less than the appraised value thereof.
>
> Under authority from the Department, dated November 11, and 16, 1895, the island embracing the tract of land in question was duly appraised, and on May 13, 1896, the Secretary ordered the same to be offered at public sale and sold to the highest bidder, but not at less than the appraised value thereof.
>
> In view of the foregoing, I conclude that the land thus applied for is not subject to said location.

Specifications 1 and 5 of the appeal cover, substantially, the contentions of the appellants, as follows:

> 1. It was error to find as a matter of fact that the premises in controversy are part of an island which was reserved, March 10, 1865, or at any time, by executive order or otherwise, for military purposes.
>
> * * * * * * *
>
> 5. Even if the premises in controversy are a part of an island which was reserved by executive order of March 10, 1865, for military purposes, it was, nevertheless, error of law to hold and decide that, because of that fact and the further fact that the original reservation was, July 22, 1884, turned over to the Interior Department under the act of July 5, 1884, and under said act the land appraised and ordered to be sold at public sale, the tract in controversy was necessarily not subject to the application of appellant.

By letter of April 27, 1898, the Department called on your office for more specific information as to the locus of the land and the history of the reservation.

In your office letter of May 3, 1898, responsive to said request, it is stated that the island, as originally surveyed, contained 54.70 acres, in sections 28 and 33, of said township; that in 1895, the general appraiser of abandoned military reservations visited the land, with a view of appraising it, as provided in the act of July 5, 1884, and reported that after diligent inquiry he found that what was once the island no longer existed, and that the water once running along the south side of it was no longer there, so that the island as it originally existed was connected with the main-land lying within the limits of Kansas City, Missouri; that said island with its accretions covered an estimated area of two hundred acres of very valuable land; also that the lines of the island were entirely obliterated, so that it was impossible to locate the land until it had been resurveyed; that the matter was reported to the Department and authority requested to re-establish the corners on the island and re-meander it in accordance with the field notes of the origi-

nal survey; also to survey any land remaining outside of the original meander lines of the island, so that a proper plat could be constructed showing the island as it existed at the time of the original survey, and the area and extent of the land, attached thereto, which had formed since the original survey, which request was granted by the Secretary of the Interior, and the resurvey accordingly made.

Your office also transmits photolithographic copies of the plats of the original survey and resurvey of the island, a copy of the President's order of March 10, 1865, reserving said island for military purposes, and a copy of the further order of the President of July 22, 1884, transferring the island to the control of the Secretary of the Interior for disposal under the act of July 5, 1884.

The map of the resurvey of said island made and certified as correct, shows the present area of the island, with its accretions, to be 130.15 acres, and that lot 1 of section 28, in controversy, contains 41.04 acres. A partition line of accretion is drawn on the map, apparently in the center of the dry bed of the old slough which at one time separated the island from the main-land on the Missouri side.

The contention of the appellant that the premises in controversy are not part of the island which was reserved for military purposes, March 10, 1865, is thus made plain, being based on the idea that said lot 1, as shown by the new survey, "is not coincident with the whole or any part of said original reservation," and is therefore no part of the island which was reserved by executive order of March 10, 1865, for military purposes, and that this being so, it is not subject to disposition under the act of 1884 as an abandoned military reservation.

It will not be necessary to inquire into the law of riparian proprietorship as applicable to the State of Missouri and administered by the courts of that State to refute this proposition. It can make no difference, so far as the question here presented is concerned, whether the one-half, the whole, or any part of the now dry bed of the old slough which once separated the island from the main-land is the property of the United States. The main-land on the bank of the slough is private property, in which the United States has no interest, hence whatever part of the bed of the slough does not belong to the United States belongs to either the title holders of the main-land or to the State of Missouri, and to that extent is not subject to the disposition of the United States, and can not be located with Porterfield scrip.

Acting on the hypothesis, which is probably correct that the whole of lot one as shown by said survey is the property of the United States, then it seems clear that so much land as was added to the island by the reliction of waters is invested with the same status as that occupied by the island at the time it became a part thereof, and it appearing that at that time said island was reserved for military purposes, the accretions added thereto, as aforesaid, became in fact and in law a part of that reservation, and were therefore part of an abandoned military

reservation, which was by the President's order of July 22, 1884, aforesaid, transferred to the control of the Secretary of the Interior for disposal under the act of July 5, 1884.

The act of April 11, 1860 (12 Stat., 836), entitled "An act for the relief of the legal representatives of Charles Porterfield, deceased," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and required to issue to William Kinney and Thomas J. Michie, executors of the last will and testament of Robert Porterfield, deceased, a number of warrants, equal to six thousand one hundred and thirty-three acres of land, according to the usual subdivisions of the public surveys, in quantities not less than forty acres; to be by them located on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location within any of the States or Territories of the United States where the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre; to be selected and located in conformity with the legal subdivisions of such surveys, and appropriated according to the directions contained in the last will and testament of the said Robert Porterfield, deceased, in the same manner and for the purposes directed in regard to the lands which were lost by the said legal representatives in the action with Clark and others, as decided by the Supreme Court of the United States.

The lot in controversy is public land which has been surveyed, is single minimum land, and is subject to the location of Porterfield scrip, unless Congress had directed that it be otherwise disposed of.

The act of July 5, 1884 (23 Stat., 103), provides in part as follows:

That whenever, in the opinion of the President of the United States, the lands, or any portion of them included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

That the Secretary of the Interior may, if in his opinion the public interest so require, cause the said lands, or any part thereof, in such reservations, to be regularly surveyed, or to be subdivided into tracts of less than forty acres each, and into town lots, or either, or both. He shall cause the saids land so surveyed and subdivided, and each tract thereof, to be appraised. . . . ; and when the appraisement shall be approved, he shall cause the said lands, subdivisions and lots to be sold at public sale, to the highest bidder for cash, at not less than the appraised value thereof, nor less than one dollar and twenty-five cents per acre.

There is no contention that the reservation of this island in 1865 for military purposes was not, so long as it existed, such an appropriation as took it out of the class of lands subject to location by Porterfield scrip, but it is urged that the sole and only effect of the proceedings recited was to extinguish a former reservation or use, and to put the land formerly included therein back into the public domain, subject to disposition under general laws, as well as under the act of July 5, 1884, that the acts of July 5, 1884, and April 11, 1860, *supra*, should be construed *in pari materia*, where equally applicable, and that "the senior

title accruing under either act appropriated the land and held it as against the other."

This argument is not sound.

Recurring to the main features of the act, it is clear that it was not thereby contemplated that lands embraced in abandoned military reservations should be restored to the public domain for general disposition under the public land laws.

That Congress has paramount control over the public domain of the United States, and that it may dispose of it as it sees proper, within constitutional limitations, admits of no question, and where that branch of the government has directed that lands of a particular class or occupying a particular status shall be disposed of in a special manner, such manner of disposition is exclusive, unless a contrary intention clearly appears, and the land department is without authority to make a disposition of such lands other than in the way specifically provided.

This land is not subject to disposition under the general land laws, nor under a private act, for the reason that Congress, in the exercise of its authority, has directed otherwise.

The decision appealed from is affirmed.

In connection with this case, the attention of the Department is called to the application of John H. Menssing to make homestead entry for lots 1 and 2 of fractional section 28, and lots 1 and 2 of fractional section 35, township 50, range 33, Boonville land district, Missouri, which was rejected by the register and receiver and appeal taken to your office, which was transmitted to the Department for consideration in connection with the appeal of Snyder, in the matter of his application to locate Porterfield scrip on the land.

This application to homestead the land is made under the proviso to section 2 of the act of 1884, which protects settlers under certain conditions. Inasmuch as your office has not passed on said application, the papers in connection therewith are returned for such action as may seem proper.

RAILROAD GRANT—INDEMNITY—APPLICATION TO ENTER.

TUBBS *v.* NORTHERN PACIFIC R. R. CO.

The improvement of land with a view to taking the same under the timber culture law confers no right thereto that will bar indemnity selection thereof.

The ruling in Ard *v.* Brandon, 156 U. S., 537, that the failure of an applicant to appeal from the erroneous rejection of his application to enter does not defeat his right to the land, had reference to the case of a settler whose application under the settlement laws was erroneously rejected, and who continued to reside upon and claim the land, and is not applicable to a timber culture application erroneously rejected.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 20, 1898.* (W. A. E.)

The tract here involved, viz., the SE¼ of Sec. 15, T. 15 N., R. 42 E., Walla Walla, Washington, land district, was included in the with-

drawal of March 30, 1872, on amended map of general route of the Northern Pacific Railroad, and on definite location of the road, it fell within the indemnity limits of said road, the withdrawal being continued by executive order of November 17, 1880. These withdrawals have been held to be without authority of law and of no force or effect. Cole *v.* Northern Pacific R. R. Co., 17 L. D., 8; Northern Pacific R. R. Co. *v.* Davis, 19 L. D., 87.

December 17, 1883, the company selected said tract as indemnity. No losses were specified at that time, but on October 27, 1887, a list of lands lost in place was filed, and on August 30, 1892, a rearranged list was filed, setting forth selections and losses tract for tract.

September 15, 1888, Hiram Tubbs filed an application to make timber culture entry for the land.

A hearing was ordered to determine the rights of the parties, and after much delay testimony was taken April 16, 1895.

August 6, 1895, the local officers recommended that the company's selection be canceled and Tubbs's application allowed.

On appeal your office reversed the decision below, and held the selection intact, whereupon Tubbs appealed to the Department.

At the hearing Tubbs testified that he had been claiming the tract in controversy since 1873, in connection with the quarter section adjoining this on the north, which he had entered under the homestead law. In 1883 (whether before or after the date of the company's selection is not shown) he tendered his timber culture application for the tract in question, with the proper fees and commissions, and on the rejection of said application he directed his attorney to take an appeal to the General Land Office, but he could not say whether the appeal was filed. In 1883 he fenced about fourteen or fifteen acres of said tract, and in 1886 or 1887 he completed the fence around the entire tract. This fence was the only improvement he had made on the land. He had bought tree seed to plant, but they had not been planted.

It is argued on behalf of Tubbs that the railroad company initiated no valid claim to the land in question until it filed its rearranged list in 1892. The Department has held, however, in the case of O'Brien *v.* Northern Pacific Railroad Company (22 L. D., 135), that selections of this character are valid from the date of the original selection.

The claim of the company to the land here involved attached, then, on December 17, 1883, when it selected said tract, and the validity of the selection is dependent upon the status of the tract at that date.

In the case of Romaine *v.* Northern Pacific Railroad Company (22 L. D., 662) it was held that the improvement of land with the view to taking the same under the timber culture law confers no right thereto that will bar indemnity selection thereof.

Unless, therefore, Tubbs had, at the date of the company's selection, a valid pending application for the land, the company's right is superior. He testifies that he filed an application in 1883, but he does not

show whether this application was filed before or after the company's selection, nor does it appear that he appealed from its rejection. If it was filed after the company's selection, then it is clear that the company's rights are superior. If it was filed before the company's selection and he failed to appeal from its rejection, then he had no pending application at the date of the company's selection and consequently the company's rights are superior.

It is contended on behalf of Tubbs that under the decision in the case of Ard *v.* Brandon (156 U. S., 537), it was not necessary that he should have appealed from the erroneous rejection of his application to enter. That decision had reference to the case of a settler whose application under the settlement laws was erroneously rejected and who continued to reside upon and claim the land. It does not apply to a timber culture application erroneously rejected.

It must be held, therefore, that Tubbs has failed to show such a right in himself as would defeat the company's selection.

Your office decision is affirmed.

MINING CLAIM—DISCOVERY—JUNIOR LOCATION.

DUXIE LODE.

Where an applicant for mineral patent permits a junior adverse applicant to include in his claim the land embracing the discovery on which such earlier claim rests, under an agreement that the land in conflict will be deeded to the holder of said claim on securing title thereto, said action will not be held to work such a loss of the discovery on the part of the prior applicant as will defeat his entire location, it appearing that said agreement has been carried into effect, that said applicant has at all times been in possession of the ground in question, and that said discovery and improvements were not made the basis on which patent was secured under the junior location.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 20, 1898.* (E. B., Jr.)

In the case of the Duxie lode claim, Glenwood Springs, Colorado, mineral entry No. 106, made January 3, 1887, by James McDonnell and others, your office, on May 26, 1896, required a supplemental abstract of title and republication of notice of application for patent, allowed applicants sixty days to show cause why the entry should not be canceled as to all ground embraced therein which had been patented as the Jote Smith lode claim, mineral entry No. 428, and allowed them the same time to show cause why their entry should not be canceled as to the remainder thereof for the reason that the ground containing the Duxie discovery shaft and the rest of applicant's improvements had been excluded from the entry and patented as part of the Tipperary Boy lode claim, mineral entry No. 76.

The applicants, in response, made no objection to the cancellation of

their entry as to said ground embraced in the Jote Smith patent, and agreed to comply with the requirements as to abstract of title and republication if your office would accept a conveyance of the said ground on which were the Duxie discovery and other improvements, and, in the absence of other objection, would then issue patent upon the amended entry. By its decision of October 27, 1896, your office declined to accept such reconveyance and held the Duxie entry for cancellation. The Duxie applicants thereupon appealed to the Department.

The Duxie claim was located August 5, 1879. Application for patent therefor was filed October 14, 1885, and included the ground in question. No adverse claim was filed against the Duxie application during the period of publication, which expired in December, 1885. The delay thence until January 3, 1887, when the Duxie entry was made, was caused, apparently, by the pendency of a suit by the Duxie claimants in support of their adverse claim against the then pending and prior application for the Jote Smith claim. This suit was settled December 18, 1886, in favor of the Jote Smith applicants.

The Tipperary Boy claim was located March 29, 1884. The application for patent therefor was filed April 17, 1886, and included the ground in question, about one acre, whereon are the Duxie discovery and improvements. Entry thereunder was made July 3, 1886, and patent issued thereon December 20, 1890. The inclusion in the Tipperary Boy application and patent of the Duxie ground above indicated without objection by the Duxie applicants, is explained in the affidavit of Thos. McDonnell, one of said applicants, as follows:

When the owners of the said Tipperary Boy Lode, Messrs. D. R. C. Brown and Patrick Fitzgerald, were about to make application for patent upon said Tipperary Boy Lode claim they came to this affiant and his co-owners and agreed with affiant and his co-owners that if the said Duxie Lode would not adverse the application of said Fitzgerald and Brown upon their said Tipperary Boy lode mining claim, the said Fitzgerald and Brown would immediately upon receiving their receiver's receipt upon the said Tipperary Boy lode claim, convey by good and sufficient deed to affiant and his co-owners all of the territory in conflict between the said Tipperary Boy and the said Duxie Lode; that affiant and his co-owners relying upon the said agreement so made did not adverse the said application of the Tipperary Boy Lode, believing that by the said agreement they were receiving all that could possibly accrue to them from the most favorable termination of an adverse and a suit and judgment thereon; that after the owners of the said Tipperary Boy Lode received their said receiver's receipt they forthwith made, acknowledged and delivered to affiant and his co-owners their deed conveying all the conflict between the said Tipperary Boy Lode and the said Duxie Lode, which said deed was duly recorded in book 31, at page 391 of the records of Pitkin county and a certified copy of which said deed is hereto attached; and by the delivery of said deed the said agreement of Brown and Fitzgerald was fully completed, carried out and executed; that affiants at the time they made said agreement and received said deed were not aware that the ground in conflict between said claims contained the shaft on the said Duxie Lode or that the making of such agreement or permitting the said Tipperary Boy Lode to get patent in accordance therewith would in any wise affect the validity of the said Duxie Claim.

These statements are corroborated by the affidavits of James McDon-

nell, another of the Duxie applicants, and by both said Fitzgerald and Brown, the Tipperary Boy applicants. A duly certified copy of the said deed is on file. It is dated August 4, 1886, and conveys all of the ground in question to the Duxie applicants, who allege that they are now and ever since have been the owners thereof, that they have sunk said discovery shaft to a depth of three hundred feet at great expense, and that

> On account of the depth of the slide and wash located on said Duxie claim it would be very difficult and expensive to make a *bona fide* mineral discovery elsewhere upon said claim.

The Duxie was the prior location, and the proceedings to obtain patent therefor, up to but not including entry, were also prior to those for the Tipperary Boy and unquestioned by the applicants for the latter. Why the Duxie applicants should have consented to the inclusion of any of their ground in the Tipperary Boy application and entry is inexplicable upon any other view than that indicated in the affidavit of Thos. McDonnell and corroborated as above stated. They evidently believed that otherwise they would have to institute adverse proceedings, which, with the delay and expense incident thereto, would be avoided by entering into the agreement they did, and that their interests as the prior and better claimants to the area in conflict would be fully protected under such agreement. From the inception of the Duxie location the claimants thereunder have been in constant possession of the ground in question and clearly did not intend to part with the claim or right to any portion thereof, especially their discovery shaft, the position of which, with reference to the lines of the Tipperary Boy location, was misunderstood.

It may be doubtful whether they were required to adverse the Tipperary Boy application, being themselves prior applicants and having already acquired the right, upon the records, to make entry of the ground in question. Without discussing the effect of its exclusion from the entry, it is plain that they had the possessory title thereto at that time, whether the same remained in them by virtue of their location and proceedings for patent, or whether they held it under said deed, and that they have held it ever since, and now hold the full legal title thereto under the patent.

Conceding for the sake of argument that the proceedings of the Tipperary Boy applicants for patent and the agreement between them and the Duxie applicants together vested the possessory title for the time being in the former, it was held in trust for the latter and was returned soon after to them in execution of the trust. It thus appears that whatever right or title was obtained by the Tipperary Boy applicants to the said ground, it was in no sense obtained or asserted in hostility to the right and claim of the Duxie applicants, but rather in confessed recognition and acknowledgment thereof. The Department is of opinion that there has not been shown such a

loss of the discovery in this case as to work a loss to the Duxie applicants of their entire location, and that a reconveyance of the ground in question is not essential to the issue of patent for such residue of the location as applicants may appear entitled to after compliance with the requirements hereinbefore mentioned.

It should be stated that the discovery and improvements upon the area in conflict are not the discovery or improvements upon which the Tipperary Boy patent was obtained; in other words, this is not a case where the discovery and improvements in question are being made to do double duty by way of securing patent to two separate claims.

The decision of your office is modified according to the views herein expressed.

MINING CLAIM—APPLICATION—EXPENDITURE.

OPINION.

Under section 2325, R. S., an application for a mineral patent is not limited to a single claim, but may embrace "any land claimed and located for valuable deposits," otherwise spoken of as "the claim or claims in common;" but a fair construction of the word "claim," as used in said section in connection with the stated expenditure required as a prerequisite to patent, and as generally used in the mining laws, requires that where more than one claim is included in the application the expenditure must equal five hundred dollars for each claim.

Secretary Bliss to Edward O. Wolcott, U. S. Senate, June 21, 1898.

I have the honor to acknowledge the receipt of your letter of the 6th instant, inviting my attention to an accompanying brief, regarding the $500 expenditure required upon a mining claim as a condition to obtaining patent thereto, and requesting an early opinion upon the question.

My attention is not called to any pending case involving that question nor is amended paragraph 53, of mining regulations, referred to in the brief accompanying your letter, questioned in any proceeding now before this office. While I am glad to comply with your request, an opinion given under these circumstances must be regarded as informal and as not entitled to the consideration which would attach to a ruling made in the usual course of deciding litigated and contested cases, after an examination of opposing contentions. Amended paragraph 53 of the mining regulations (26 L. D., 378), is the one affecting the question presented by your letter and a copy of that paragraph is hereto attached.

In the circulars and decisions of the land department prior to October 31, 1885, the several Secretaries of the Interior and Commissioners of the General Land Office to whom the question was presented, held that an expenditure of $500 in labor or improvements must be made upon each mining location embraced in an application for patent, but on that date the former holding was revoked and it was held that an expenditure of $500 was sufficient whether the application embraced

one location or several locations held in common. This ruling was doubted by some subsequent departmental decisions but was practically adhered to until the adoption of new mining regulations December 15, 1897 (25 L. D., 561). It was then determined to return to the ruling prevailing prior to October 31, 1885, as the better one both in law and in practice. In making this change, however, it was believed that a just consideration of those who had applications for patent then pending, or who were about to make such applications, required that they should not be affected by the change, and hence the proviso to amended paragraph 53.

The necessity for this change in the mining regulations grew out of the fact that the relaxed and liberal ruling made October 31, 1885, was the subject of very considerable abuse. In one local land office alone within less than a year mineral entries were allowed upon proof of expenditure of only $500 upon a group of claims in the following instances: one entry embracing twelve claims; two entries embracing sixteen claims each; one entry embracing twenty-one claims; one entry embracing thirty-two claims, and another entry embracing fifty-six claims. Where patent can be obtained for fifty-six mining claims on an expenditure of only $500 in labor or improvements, being less than $10 per claim, it will be seen that title to mineral lands can be secured in almost unlimited quantities without any real development of their mineral character. Permitting the acquisition of large tracts of mineral lands in this way, withdraws from the prospector and miner opportunities which would otherwise be theirs. It stimulates speculation in mere prospects and undeveloped ground instead of promoting active mining operations. Where there has been an actual development of the mineral character of land and a disposition to extract the mineral deposits is shown, every reasonable effort should be made to assist the claimant in obtaining a patent to his claim, but where the conduct of the claimant harmonizes with an intent on his part to grab and monopolize at a minimum expenditure all the land suspected of containing mineral in a given locality, it is not believed that his speculative effort should be encouraged.

Apart, however, from any question of policy it is believed that amended paragraph 53 conforms to existing legislation which, of course, is binding upon the land department.

The solution of the matter depends upon the meaning of the word "claim" in the mining laws and especially in that portion of section 2325, requiring a stated expenditure in labor or improvements as a condition to obtaining a patent.

Section 2320 which governs the location of mining claims, provides:

Mining *claims* upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore *located*, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their *location*. A mining *claim located* after the tenth day of May, eighteen hundred and seventy-two, whether *located* by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the

vein or lode; but no *location* of a mining *claim* shall be made until the discovery of the vein or lode within the limits of the *claim located*. No *claim* shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any *claim* be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each *claim* shall be parallel to each other.

Section 2324 in requiring an annual expenditure upon mining claims, provides:

On each *claim located* after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year . . . . but where such *claims* are held in common, such expenditure may be made upon any one *claim*: . . . .

Section 2325 in providing the manner of obtaining a patent to mineral land, says:

A patent for any land *claimed* and *located* for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to *locate* a *claim* under this chapter, having *claimed* and *located* a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the *claim or claims in common*, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the *claim or claims* . . . . The claimant . . . . shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the *claim* by himself or grantors;

The statutory provisions having special relation to placer claims are:

Sec. 2329. R. S. *Claims* usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode *claims;* but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public land.

Sec. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous *claims* of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no *location* of a placer *claim*, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; . . . .

Sec. 2331. Where placer *claims* are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining *claims located* after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such *location* shall include more than twenty acres for each individual claimant; but where placer *claims* can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands;

In Del Monte Mining Co. *v.* Last Chance Mining Co. (170 U. S.,), it is held:

That which is located is called in section 2320 and elsewhere a "claim" or a "mining claim." Indeed, the words "claim" and 'location' are used interchangeably.

In County Seat of Linn County (15 Kan. 500, 527), Mr. Justice Brewer, speaking for the court, said:

> Now when the legislature has used a word in a statute in one sense, and with one meaning, when it subsequently uses the same word in legislation respecting the same subject-matter, it will be understood to have used it in the same sense, unless there be something in the context, or the nature of things, to indicate that it intended a different meaning thereby.

In Pitte *v.* Shipley (46 Cal., 154, 160), it is said:

> It is a familiar principle of construction that a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended.

In Rhodes *v.* Weldy (46 Ohio St. 234, 243), it is said:

> Where the meaning of a word or phrase in a statute is doubtful, but the meaning of the same word or phrase is clear where it is used elsewhere in the same act or an act to which the provision containing the doubtful word or phrase has reference, the word or phrase in the obscure clause will be held to mean the same thing as in the instances where the meaning is clear.

Sections 2324 and 2325 require stated expenditures in labor or improvements upon a mining claim, one requiring that the worth or cost of such labor or improvements shall equal one hundred dollars to entitle the claimant to hold the claim for a year, and the other requiring that the worth or cost thereof shall equal five hundred dollars to entitle him to a patent; in other words, that while an expenditure of one hundred dollars in labor or improvements entitles the claimant to the occupancy and enjoyment of the claim for one year, an expenditure of five hundred dollars is required to entitle him to the unrestricted occupancy and enjoyment thereof for all time as vouchsafed by a government patent.

In Chambers *v.* Harrington (111 U. S. 350, 353), Mr. Justice Miller, in holding that the annual expenditure required by section 2324 may be made upon one of several claims held in common, says:

> But obviously on this one the expediture of money or labor must equal in value that which would be required on all the claims if they were separate or independent.

It will be noted that under the language of section 2325 an application for patent is not confined to a single claim but may embrace "any land claimed and located for valuable deposits" otherwise spoken of as "the claim or claims in common," and that while the section requires the filing of a plat of "the claim or claims in common," showing the boundaries of "the claim or claims," the proof of the five-hundred dollar expenditure must be of labor expended or improvements made upon the "claim." The use in this instance of the word "claim" alone and the omission of the words "or claims in common" "or claims" elsewhere used in the section, strongly indicate that the word "claim" alone was not employed in the sense of locations held in common, and that while several claims in common may be embraced in the same application for patent, survey and notice, a single expenditure of five hundred dollars will suffice for but a single claim.

Whatever constitutes a proper annual expenditure under section 2324 may unquestionably be treated as a part of the greater expenditure exacted by section 2325, and since the former is deemed to have been made upon each of several claims held in common when it is made upon any one of them for the benefit of all, so under section 2325 the expenditure there required will be deemed to have been made upon each of several claims held in common and included in one application for patent when it is made upon any one of them for the benefit of all, but as said in Chambers *v.* Harrington, *supra*,

> obviously on this one the expenditure of money or labor must equal in value that which would be required on all of the claims if they were separate or independent.

This view is very strongly supported by Mr. Lindley in his work on Mines, section 673, and is in accord with the construction and practical application of the mining laws by the land department from the time of their enactment until October 31, 1885, as before stated.

It is true that some of the language in Smelting Co. *v.* Kemp (104 U. S., 636), seems to express a contrary view, but an examination of the record in the supreme court in that case shows that in the return of the survey of the claim or claims there in question it was stated that the value of the labor and improvements thereon "probably amounts to ten thousand dollars," which was much more than five hundred dollars for each claim, and this was not questioned in the pleadings or evidence nor was it contended on behalf of those claiming under the mineral patent that an expenditure of five hundred dollars in that case would have been a compliance with the statute. Under these circumstances, it is doubtful whether any decision respecting the amount of expenditure required by section 2325 was intended by the court. The controlling question was whether the application and other steps necessary to obtain a patent must be separately made and taken in the case of each individual location or claim embraced in a group held in common.

For the reason here given, I can not accept the conclusion expressed in your constituent's brief, which is returned herewith.

Prepared by

WILLIS VAN DEVANTER,
Assistant Attorney General.

MINERAL LAND—GUANO—STATE SELECTION.

RICHTER ET AL. *v.* STATE OF UTAH.

Guano is a mineral, and lands valuable for deposits of guano are mineral lands within the meaning of the mining and other laws of the United States, and hence not subject to selection by the State under section 8, act of July 16, 1891.

Secretary Bliss to the Commissioner of the General Land Office, June 23, 1898.

(W. V. D.) (E. B., Jr.)

On August 7, 1897, the State of Utah filed its selection list No. 5 for certain tracts of public land under the grant made in section 8 of the

act of July 16, 1894 (28 Stat., 109), to the State, "for the use of an agricultural college therein." Included in this list are lots 2, 3, 4, 5, 6 and 7, containing 78.35 acres, being all that part of Gunnison Island, in Great Salt Lake, which is in section 10, T. 7 N., R. 9 W., Salt Lake City, Utah, land district. On January 21, 1898, Albert Richter and Davis G. Price, for themselves and others, filed a protest against the approval of the State's list as to the land above described, alleging the same to be chiefly valuable for its deposits of guano, that it had been located by them under the placer mining laws in January, 1895, and since held and worked by them in accordance with such laws, and that the claim of the State thereto is fraudulent.

In its decision of January 29, 1898, your office considered the protest, held "that the land in question is not recognized as mineral by the standard authorities and therefore can not be entered under the mining laws," that it had been regularly selected by the State, and that there was no evidence of fraud on the part of the State, and so dismissed the protest. From this decision protestants appeal, contending that guano is a mineral and that the land in question is chiefly valuable for its deposits of guano.

Gunnison Island was surveyed in the field in April and May, 1896, and the survey was approved June 13, following. It was returned as chiefly valuable for its deposits of guano. The approved report of the United States deputy surveyor, which forms part of the official field notes, is as follows:

Gunnison Island in Great Salt Lake located in Secs. 10, 15 and 16, T. 7 N., R. 9 W., is all mountainous land with the exception of a few small bays or coves where by disintegration and deposition a small area of sloping shore line has been formed. The island is in fact a sharp, rocky reef running nearly north and south, rising quite abruptly from the bottom of the lake with deep water close to the shore.

The top of the range or crest running throughout the middle of the island is very broken and irregular in height; the highest point is near the north end at triangulation St. C. which is an elevation of 280 feet above high water line as determined by triangulation; the mean height is about 100 feet.

There is no water on the island and very little soil and it is therefore not suited for settlement nor cultivation. The vegetation consists of thorn and weeds growing very rank and luxuriantly and is seemingly of different species from those found elsewhere in Utah as nowhere else have I encountered exactly the same.

The rock formation is a dark colored limestone intermixed in places with a light colored porphyretic rock or cement; whether this latter is due to infusion or surface deposition I did not take time to examine.

For ages past the gulls and other sea birds infesting the lake have used this island as breeding ground and their droppings have accumulated in the low sheltered places, where the nest is made, until a deposit of guano has been formed several feet in thickness (5 feet is about the maximum depth). These deposits are everywhere mixed with fragments and pebbles of limestone carried down from the disintegrating ridge along the center of the island and therefore has to be screened before being ready for the market or else crushed up by some grinding process.

The greatest portion of these guano deposits are located in Sec. 10, in Guano Bay, East Bay and West Bay, extending over the sec. line into sec. 15 for about 1000 to 1100 feet on the W. side and about 1000 feet on the east side and also a small amount

on the south and, while in Sec. 16 is none whatever; the width they cover is about 300 to 400 feet, the depth is very irregular.

From evidence filed in support of the protest it appears that on January 22, 1895, five placer claims, comprising twenty acres each, known as the Gunnison, Pelican, Sea Gull, Heron and Grebe, respectively, and on January 23, 1895, two other placer claims, known as the Diver and Birdie T., respectively, were located upon the guano deposits on said island, and that these locations embrace the land selected by the State; also that the character of the land and protestants' claim thereto under the mining laws have been made the subject of judicial investigation in a suit wherein they were plaintiffs and certain individuals who claimed adversely, apparently under the desert land laws, were defendants, and that the decision of the court in such suit, in and for the second judicial district of Utah, rendered May 3, 1897, finds, among other things, that the ground embraced in said locations and one other location by the plaintiffs, is covered by deposits of guano of great value and is not susceptible of cultivation or of supporting vegetable life; that the guano is valuable as a fertilizer and for no other purpose, its principal elements and constituents being nitrates, including ammonia, phosphates, including phosphate of lime, and sulphates, including sulphate of lime; that the land is not subject to entry save as mineral land; and that the said locations are valid under the United States mining laws and regulations; wherefore it was adjudged and decreed in said suit that the plaintiffs therein were entitled to the possession of said mining claims and that the defendants therein had no right to the lands embraced therein, and the defendants were accordingly enjoined from interfering with the possession of plaintiffs. Numerous photographs taken in April, 1895, are filed as exhibits and show the island to be, as a whole, rough, rocky and barren, its only vegetation appearing to be a species of low, spreading bush growing here and there among the rocks. These photographs also show the presence of large numbers of birds, which look like sea gulls.

Guano is the excrement of sea birds, accumulated during a long period of years into beds of varying thickness. It is a phosphate deposit and is classed by Dana in his System of Mineralogy, among the apatite group of minerals. On page 769 he says of it:

> Guano is bone phosphate of lime, mixed with the hydrous phosphates, and generally with some calcium carbonate, and often a little magnesia, alumina, iron, silica, gypsum, and other impurities. It often contains 9 or 10 p. c. of water. It is often granular or oolitic; also compact through consolidation produced by infiltrating waters, in which case it is frequently lamellar in structure, and also occasionally stalagmitic and stalactitic. Its colors are usually grayish white, yellowish and dark brown, and sometimes reddish, and the luster of a surface of fracture earthy to resinous. Shepard's pyroclasite (Am. J. Sc., 22, 97, 1856) is nothing but the hard guano from Monk's island, Caribbean sea, the mass of which he named pyroguanite, under the wrong idea of its having undergone the action of heat; in a later notice (ibid., 23, 404, 1882) Shepard suggests that pyroclasite may be a "uniform compound of monetite and the monite" or "a mechanical mixture of the two."

Phipson's sombrerite (J. Ch. Soc., 15, 277, 1862) is similar to pyroclasite from Sombrero, as shown by A. A. Julien (Am. J. Sc., 36, 423, 1863). The waters which have filtrated through the guano at Sombrero have altered the coral rock adjoining, turning it more or less completely into phosphate of lime of a yellowish or brownish color; and phosphatic stalagmites and stalactites resinous in fracture are common.

Shepard's massive glaubapatite, yellowish brown to chocolate-brown in color, and in fibrous stalactites, from Monk's island (l. c.), is also in all probability merely the guano rock above described. He says the mineral contains 15.1 p. c. of sodium sulphate, with 74.0 of calcium phosphate, and 10.3 of water; but such a compound is hardly a possibility, and the fact of its existence needs confirmation. The name, from glauber and apatite, alludes to the composition. The mineral includes also "tabular crystals," which may possibly be brushite, although the composition is against it. For analysis of the guano of Mexillones see Domeyko, C. R. 90, 544, 1880.

For various guano minerals see monetite, struvite, brushite, metabrushite, martinite, etc., p. 784, etc.; also stercorite, p. 826.

Chemical analysis of the Gunnison Island guano shows that its composition is substantially the same as that of the phosphate deposits of Florida. See Tucker *et al.* v. Florida Railway and Navigation Co., 19 L. D., p. 414.

In the recent case of Florida Central and Peninsular Railroad Co. (26 L. D., 600), the Department held, relative to Florida phosphate lands, that—

> Lands valuable for deposits of phosphates are mineral lands within the intent and meaning of the laws relating to the disposal of the public domain.

It must be held, therefore, that guano is a mineral, and that lands valuable for deposits of guano are mineral lands within the meaning of the mining and other laws of the United States.

The agricultural college grant to the State of Utah does not become effective, in any instance, until the land has been duly selected thereunder. No claim to the land in controversy was made by the State until August 7, 1897. Prior to that time, as hereinbefore appears, the land had been located as placer mining land on account of its guano deposits, had been returned by the surveyor-general as containing valuable guano deposits, and had been so declared by a court of the State in a regular judicial proceeding. The surveyor-general's return is *prima facie* evidence that the land contains valuable guano deposits, but it is not conclusive and the State not being a party to the suit in the State court is not bound by that judgment. You are therefore directed to advise the proper authorities of the State that unless, within sixty days from notice, they shall file a duly corroborated affidavit, based upon personal examination, that the land is not valuable for guano deposits, and shall apply for a hearing to enable the State to establish that fact, its said selection will be canceled. In the event of default by the State you will cancel its selection. Should a proper affidavit, duly corroborated, be filed as above required, you will order a hearing and the burden of proof will be placed upon the State.

PRACTICE—PROOF OF NOTICE—PUBLICATION—CONTINUANCE.

BELL *v.* HOUSTON.

Where the defendant objects to the proof of the service of notice, and said proof is thereupon amended to conform with the fact of service, and the defendant then asks for a continuance, action on such request is within the sound discretion of the local office, and will not be disturbed if an abuse of such discretion is not shown.

A non-resident defendant will not be heard to say that the affidavit filed as the basis for publication of notice was insufficient in that it failed to specify his last known address, where it appears that he in fact received the notice sent by registered mail.

Secretary Bliss to the Commissioner of the General Land Office, June 23, 1898.

(W. V. D.) (H. G.)

Lawrence N. Houston has appealed from your office decision of March 9, 1896, which affirms the action of the register and receiver recommending for cancellation his timber culture entry, made March 8, 1889, for the NE. ¼ of Sec. 14, T. 9 S., R. 24 (not 4) W., in the Colby, Kansas, land district, and also from your office decision of September 2, 1896, denying his motion for a rehearing.

Ira M. Bell, the contestant, filed three affidavits for contest, the last of which was filed April 29, 1895, and was evidently intended as an amendment to the others. It alleges that the contestee

has wholly abandoned said tract since making said entry; that said tract is not cultivated by said party as required by law; that he has failed to plow, plant or cultivate the first or second five acres of land from the date of entry to this date; that he only run furrows about ten feet apart on about six acres of land that had been plowed by a former entryman in the spring of 1892; that there is (are) no tree seeds or cuttings now growing on said land—said failures exist at this date.

The entry is described in this affidavit of contest as made March 8, 1891, when it was, in fact, made March 8, 1889, but the tract is properly described and the number of the entry is given. As this mistake was clearly a clerical error, it will not be noticed. Notice was given by publication, and the hearing was set for June 21, 1895.

The parties appeared on the day appointed, the contestee appearing specially and only for the purpose of moving to set aside the service of the notice because practice rule No. 14 had not been observed, in that the proof of service did not show that a copy of the notice had been posted in the local office or upon the tract in dispute, and because there was no affidavit filed as to the last known address of the defendant contestee, or to the effect that a copy of the notice had been sent to him at such address. A demurrer to the affidavit of contest was also filed.

The omission complained of in the proof of service was supplied by amendment conforming the proof to the facts and thereafter the motion

as well as the demurrer was overruled. A verified motion was then filed by counsel for the contestee, as follows:

STATE OF KANSAS, *Thomas County, ss:*

J. A. Gill, being first duly sworn, deposes and says: That he is the attorney of the above named defendant, Lawrence N. Houston; that on or about the 17th day of June, 1895, he received a letter from the defendant requesting and authorizing him to appear as attorney on his behalf in the above entitled contest, and that affiant, if possible, secure a continuance of said case if after examining the service he found the same to be sufficient, and if the same was insufficient, to appear specially in the case and take exceptions thereto.

That in pursuance of said letter of instructions affiant attended at the U. S. land office in Colby, Kansas, on June 21st, 1895, at the hour of ten o'clock, A. M., the time set for the first calling of said case, and the hearing thereof.

That affiant at that hour made examination of certain purported service in said case and found such service to have been irregular and defective, and not such service as the law contemplates in contest cases.

That thereupon affiant, as attorney, for said defendant, made a special appearance in said contest, and moved to set aside the service in said case, for reasons stated in said motion, which was in writing, and duly filed in the office.

That thereafter the register and receiver on said day allowed the plaintiffs herein to file a new and different service of notice of contest in said case, and overruled defendant's motion to set aside service of notice.

That affiant is informed by the defendant that he has a good defense on the merits of the case as against the contestant, and that defendant prays a continuance of this case to enable him to secure his testimony and present the same on the hearing thereof.

That affiant personally has no knowledge of the nature of the defense, nor of the names of defendant's witnesses, and since his employment has not had sufficient time to investigate the merits of the case.

That since the filing of proof of service herein, the case being at issue only to today, it would have been impossible for the defendant to have notified and to have procured his witnesses and attended this trial. The defendant residing at Enid, Oklahoma Territory.

That this application is not made for delay, but that justice may be done.

That affiant believes if granted a continuance herein defendant can and will procure the attendance of his witnesses or their testimony herein.

Wherefore, the defendant moves that continuance be granted herein to enable the defendant to secure his testimony and present his defense.

The motion for continuance was overruled, and the evidence of the contestant and his witnesses was taken, there being no cross-examination on the part of the contestee. The local officers found for the contestant, and your office affirmed their decision.

A motion for a rehearing was filed in your office May 11, 1896. The grounds therefor are in substance that no service was had upon the contestee as required by the rules of practice; that the affidavit of contest did not state sufficient grounds for contest; accident and surprise, which ordinary prudence could not have guarded against at the time of trial; and newly discovered evidence. Accompanying this motion is the affidavit of the entryman, contestee, detailing his efforts to secure a growth of timber upon the tract covered by his entry, and alleging a substantial compliance with the timber culture acts. This motion was denied by your office.

The appeal to the Department alleges error, substantially, as follows:

1. In denying the motion for a rehearing.

2. The evidence taken at the hearing fails to show non-compliance with the law.

3. That no sufficient notice was served upon the defendant.

The decision upon the motion for continuance is challenged in that part of the appeal assigning as error the denial of a rehearing.

It appears that the entryman was notified by telegram from his counsel, on the day immediately preceding the hearing, that counsel thought it unnecessary for him to appear at the hearing. This communication was based upon the apparent defects in the proof of service by publication then on file, but counsel must have been aware of the power vested in the local office to allow the proof of service to be amended so as to state the service actually had.

Such a practice is in vogue in State and Federal courts, and in the land offices, and is generally known. It can not, therefore, be said that he was taken by surprise by an amendment, which, as in this instance, merely conformed the proof to the facts, the existence of which he could have learned upon inquiry. The day had been set for the hearing and the parties were called upon to appear. The contestant was present with his witnesses, and the contestee should have been ready with his. If he chose to risk his case upon the apparent defect in the proof of service, he had that right, but if his attack upon the proof of service was not well grounded, his adversary should not be subjected to the inconvenience and expense incident to again bringing his witnesses to the land office. At most, action upon the motion for a continuance was within the sound discretion of the local officers, and their action in that respect will not be interfered with, unless an abuse of discretion is shown. Uppendahl *v.* White, 7 L. D., 60, 62. It can not be said that there was an arbitrary or unreasonable exercise of discretion in the denial of the motion, as it was proper to consider the actual notice received by the defendant as herein shown, and the inconvenience and expense that would result to the contestant if the motion had been granted.

It appeared that the defendant was a non-resident, that his address was Enid, O. T., that a copy of the notice was mailed to him at Enid, O. T. by registered mail, May 18, 1895, and that the registered notice was received and receipted for by defendant. The time for the hearing was June 21, 1895. Under the circumstances of this case the defendant will not be heard to complain that the giving of notice by publication, registered mail and posting was based upon an insufficient affidavit for publication.

The motion for a rehearing does not disclose any newly discovered evidence. The evidence offered could have been furnished at the time of the hearing, had not the contestant chosen to rely upon the defects in the proof of the service of notice.

The evidence taken on behalf of the contestant clearly established the grounds of the contest and the failure of the entryman to comply with the law, and as stated, the defendant did not avail himself of the opportunity to offer evidence to the contrary.

The decision of your office directing the cancellation of the entry of Lawrence N. Houston must be affirmed.

HOMESTEAD ENTRY—INDIAN OCCUPANCY.

UNITED STATES *v.* DOUTHIT ET AL.

Land embraced within the use and occupancy of Indians is not subject to homestead entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 25, 1898.* (C. J. G.)

These cases involve lands in Secs. 1 and 2, T. 52 S., R. 41 E., Gainesville land district, Florida.

Under date of September 26, 1893, the Commissioner of Indian Affairs addressed a communication to this Department relative to the condition of the Seminole Indians in Florida and the necessity of reserving the lands in said sections 1 and 2 for their use. He recommended that instructions be given not to allow any filings or entries in said sections until further orders, and if any filings or entries had already been made to take appropriate action for their cancellation, if, after proper investigation and hearing, it should be found that they conflict with the provisions of circulars of May 31, 1884, and October 26, 1887, published in 3 L. D., 371, and 6 L. D., 341.

The Department concurred in the recommendation of the Commissioner of Indian Affairs, and, on October 11, 1893, requested your office to issue the necessary instructions to carry out the same.

October 14, 1893, your office directed the local office

to allow no more entries or filings in sections one and two of township 52 south, range 41 east, until further orders; and to report at once in the matter of the entries already allowed in said sections.

October 18, 1893, the local office reported that, among others, homestead entries had been made as follows:

Mary E. Douthit, September 9, 1892, for the E. ½ of the SE. ¼ and the SW. ¼ of the SE. ¼, Sec. 1; James G. Truitt, July 6, 1893, for the SE. ¼, Sec. 2; Jim W. Douthit, July 7, 1893, for the W. ½ of the SW. ¼, the SE. ¼ of the SW. ¼ and the SW. ¼ of the NW. ¼, Sec. 1; and William N. Woods, October 5, 1893, for the N. ½ of the NE. ¼ (or lots 1 and 2) and the NE. ¼ of Sec. 1: all in T. 52 S., R. 41 E., Florida.

November 27, 1893, your office instructed the local office to advise the above described entrymen that they would be allowed sixty days in which to show cause why their entries should not be canceled for

conflict with the alleged claims of the Seminole Indians for said lands. The entrymen filed their several answers to the rule to show cause, but the same not being deemed sufficient by your office, their entries were held for cancellation by letters of April 24, 1895, and January 25, 1896.

The said entrymen thereupon appealed to this Department, where, under date of April 28, 1896 (not reported), it was held as follows:

> The four homestead entries involved herein were made respectively September 9, 1892, July 6, 1893, July 7, 1893, and October 5, 1893,—all prior to your office letter of October 14, 1893. It was therefore error to hold said entries for cancellation in the absence of proof that the lands covered by them when they were allowed, were "in possession, occupation and use of Indian inhabitants, or covered by their homes and improvements," and therefore protected against entry by the circular published in 6 L. D., 341-2.

The decisions of your office were therefore set aside and it was directed that a hearing be ordered

> to determine whether on the dates of the entries aforesaid, to wit, between September 9, 1892, and October 5, 1893, the lands herein involved were or were not in the possession, occupation and use of Indian inhabitants, or covered by their homes and improvements within the true intent and meaning of the circular of October 26, 1887.

It appears that prior to departmental order of October 11, 1893, relative to reserving these lands from entry, John A. Harp made application to enter, under the homestead laws, the NE. ¼ of Sec. 2, T. 52 S., R. 41 E., which was rejected for the reason that part of the land applied for was embraced in the homestead entry of Jeremiah Pinder. After securing Pinder's relinquishment Harp again made application for the same land, but being filed subsequently to the date of the order withdrawing the township from entry, his said application was again rejected. He appealed to your office, where, on April 6, 1895, the action of the local office was affirmed; whereupon he appealed to this Department.

April 28, 1896, the same day on which decision in the cases of the entrymen herein named was rendered, the Department passed upon Harp's appeal, finding that:

> The appellant alleges that he presented his application long prior to the order of reservation, but does not fix the date, which is stated in the decision appealed from to be June 5, 1893, though there is nothing further in the record in confirmation of the statement. If the appellant's contention be correct, his entry should go of record as of the date of his application.

Your office decision rejecting Harp's application was accordingly set aside, and it was ordered that his case be consolidated with the four cases herein described, so that one hearing might be had in all five cases. It was also expressly stated, in said departmental decision, that the conclusion reached therein was not intended to preclude further inquiry into the question of Indian occupancy.

A hearing was ordered for August 17, 1896, before United States Commissioner A. R. Simmons, at Lemon City, Florida, at which time the claimants appeared and offered testimony. The government was represented by Indian Agent J. E. Brecht and Special Agent C. H. Maginnis

of your office, but no testimony was offered in behalf of the government, as a continuance, on request of the special agent, was granted to February 4, 1897. On that date the government appeared as before, the claimants being represented by attorney, but no further testimony was offered in their behalf. The testimony offered by the government applied solely to the claim of Harp.

The local office rendered decision finding that at the time the entries heretofore described were made, the lands embraced therein were not in the possession, occupation and use of Indian inhabitants, or covered by their homes and improvements. It was therefore recommended that said entries, the same having been made prior to the date of the order of reservation, be removed from suspension. As to the tract applied for by Harp, however, it was found that the same was covered by the homes and improvements of the Indians at date of his application; it was therefore the opinion that said application should stand rejected.

October 6, 1897, your office, upon Harp's appeal, affirmed the action of the local office, and he has now filed a further appeal to this Department. Said appeal is accompanied by numerous affidavits alleging that some of the witnesses on behalf of the government were not on friendly terms with appellant and that there never were any Indian settlements or improvements on the land embraced in Harp's application.

No explanation is given why claimant Harp and his witnesses failed to testify at the hearing had February 4, 1897, or why the testimony now offered was not previously submitted. But giving due weight to appellant's evidence, including the affidavits, the Department is of opinion that it fails to overcome the positive proof of Indian use and occupancy of the land embraced in appellant's application at the time he went upon said land.

The local office states that Harp first applied for this land on June 6, 1893, and that said application was rejected as defective; that he neither cured the defect of said application nor appealed from its rejection; and that he again filed an application for the same land on June 8, 1894, which was rejected by reason of the departmental order of October 11, 1893. Your office correctly held, however, that the determination of the exact date of Harp's first application is immaterial, as the evidence conclusively shows that he made application to enter land that was at the time used and improved by the Indians within the intent and meaning of the circular of October 26, 1887, *supra*.

Your office decision of October 6, 1897, is hereby affirmed.

MINING CLAIM—NOTICE OF APPLICATION—END LINES.

HALLETT AND HAMBURG LODES.

In determining the sufficiency of the published notice of an application for mineral patent the notice must be taken as a whole, and if when so considered the situation of the applicant's claim on the ground is designated with substantial accuracy, the notice must be held sufficient.

The publication of the notice of application is under the direction and supervision of the register; but it is the duty and privilege of the applicant to see that in such publication there is due compliance with respect to all essential requirements.

A protest alleging the absence of a valid discovery on the part of the mineral applicant presents no sufficient ground for action, where prior thereto, by final judicial determination in adverse proceedings, the land embracing the claimed discovery of the applicant was awarded to him.

A junior lode location is not invalidated by the fact that its end lines and corners are laid within or upon the surface of a valid senior location.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 25, 1898.* (E. B., Jr.)

This is an appeal by the Hallett and Hamburg Gold Mining Company from the decision of your office, dated February 16, 1897, holding defective the published notice of the application for patent to the Hallett and Hamburg locations, survey No. 8768, Pueblo, Colorado, land district, and requiring notice of the application to be given *de novo*.

Both said locations were made in March, 1892. They were surveyed in the field in February, 1894. Application for patent was filed April 26, 1894, by Charles J., H. W. and Joseph L. Hallett, and entry No. 1046 thereof was made December 3, 1896, by said company, as successor in interest. Among the references in the field notes and plat of survey to natural objects or permanent monuments to identify the claims and fix their *loci*, are given a connection between corner No. 1 of the survey and the south quarter corner of Sec. 29, T. 15 S., R. 69 W. of the sixth principal meridian, by a course S. 58° 46′ E., and distance 2231.5 feet (the same connection being given twice—once for each location), and two connections likewise from corner No. 4—one with corner No. 3 of the Apex lode claim, survey No. 8178 (patented April 22, 1895), by a course 0° 20′ E., and distance 379 feet, and the other with corner No. 3 of the Dead Pine lode claim, survey No. 7475 (patented June 20, 1893), by a course S. 29° 1′ E., and distance 500.24 feet. It is further shown by the field notes and plat that the claims are situated in the SW. ¼ of said section 29, in Cripple Creek mining district, El Paso county, Colorado; also that both said locations conflict with the Mammoth Pearl and Monarch lode locations, survey No. 7913, and with the Victor Consolidated and Victor Consolidated No. 2 lode locations, survey No. 8747; and that the Hallett location further conflicts with the Big Theater lode location, survey No. 8088, and the Hamburg with the Apex, survey No. 8178.

After noting the true *loci* of the claims as shown by the approved survey, your office decision finds the published notice defective and requires new notice in the following language:

In the description contained in the published notice of application for patent the connection of the Hallett claim is stated to be with the S. ¼ corner Sec. 29, T. 15 S., R. 69 W., and the connection of the Hamburg lode is given with the S. ¼ corner Sec. 29, T. 16 S., R. 69 W., Sixth P. M.

The notice of publication is thus shown to contain an erroneous description of the connection of said claims with the public survey and republication will therefore be required under the direction of the register, giving the correct connection in agreement with the approved survey of the claims.

Said publication should include publishing of notice on the claim and in the local office. In the preparation of said notices you will observe strict compliance with paragraphs 29, 34 and 35 of Mining Regulations. See Circular of June 22, 1896; Gowdy *et al. v.* Kismet Gold Mining Company, 22 L. D., 624; Parsons *et al. v.* Ellis, 23 L. D., 69.

The company's contentions on appeal are:

1. The notice as published is a substantial compliance with the rules and regulations governing applications for patent.

2. The description of the land is sufficient, taken as a whole, to fully identify it beyond reasonable doubt, by the connection of said claim with the public survey.

3. The law makes it the duty of the register and receiver to make and publish the notice for patent applications, and if there were errors, they are the errors of the government officers and the applicant should not be made to suffer for it.

4. The requirement of republication, based upon the technical insufficiency of notice is contrary to the long established practice of the land office for many years; but on the contrary it has been the custom to pass as sufficient all notices which constitute a fair and honest notification of the patent application.

5. That by the decision of the Hon. Secretary of the Interior made on March 3, 1897, the circular of instructions duly issued from his office, explanatory of his decision—all applications made prior to June 1, 1897, are allowed to proceed to patent without republication.

Publication of notice commenced April 29, 1894. Attached to and forming part of the proof of publication is a copy of the published notice, which reads:

MINING APPLICATION NO. 744.

U. S. LAND OFFICE, *Pueblo, Colo., April 26, 1894.*

Notice is hereby given, that Charles J. Hallet, H. W. Hallett and Joseph L. Hallett, whose post office address is Cripple Creek, Colo., have this day filed their application for a patent for 1434.3 linear feet of the HAMBURG and HALLET lodes, mines or veins bearing gold, with surface ground 300 feet in width on the Hamburg lode and 172 ft in width on the Hallett lode, situate, lying and being in Cripple Creek mining district, county of El Paso, State of Colorado, and known and designated by the field notes and official plat, on file in this office as mineral survey No. 8768, in SW. ¼ Sec. 29, township 15 south, range 69 west of 6th P. M. The exterior boundaries of said mineral survey No. 8768 being as follows, to wit:

Variation, 13 deg. 30 min. east.

HALLETT LODE.

Beginning at cor. No. 1, whence s ¼ cor sec 29, tp 15 s. r 60 w; bears s 58 deg 46 min w 2231.5 ft; thence n 80 deg 10 min w 172 feet to cor No. 2; thence n 9 deg 50 e 1434.3 feet to cor No. 3; thence s 80 deg 10 min e 172 feet to cor No. 4, whence cor No. 4, whence cor No. 3, sur No. 8178, Apex lode bears s 0 deg 20 min e .79 feet; thence s 9 deg 50 min w 1434.3 feet to cor No. 1, place of beginning, containing less area in conflict with sur No. 7913 Mammoth Pearl and Monarch lodes, and sur 8088 Big Theatre lode, 2.777 acres also excluding without waiver of rights conflict with sur No. 8748 Victor Consolidated and Victor Consolidated No. 2 lodes.

HAMBURG LODE.

Beginning at cor No. 1, identical with cor No. 1 Hallett lode, whence the s ¼ cor sec 29, tp 16 s, r 69 w; bears s 58 deg 56 min e 2231.5 ft; thence s 80 deg 10 min e 300 ft to

cor No. 2; thence n 9 deg 50 min. e 1434.3 ft to cor No. 3; thence n 80 deg 10 min w 300 ft to cor No. 4, whence cor No. 3, sur 7475 Dead Pine lode, bears s 29 deg 1 min e 500.24 ft; thence s 9 deg 50 min w 1434.3 ft to place of beginning, containing less area in conflict with Mammoth Pearl and Monarch, Apex, Victor Consolidated and Victor Consolidated No. 2 lodes, surs Nos. 7913, 8178 and 8747, 2.335 acres. Adjoining claims, Mohican, Zanona and above named conflicting claims. Area in conflict with Apex and Victor Consolidated and Victor Consolidated No. 2 lodes, excluded without waiver of rights thereto by these applicants.

RAYMOND MILLER, *Register.*

A. B. JONES, *Att'y for applicant.*
First publication, April 29, 1894.
Last publication, July 1, 1894.

It appears that all the data given in the first paragraph of the published notice are correct, that the references in the second and third paragraphs to conflicts with the Mammoth Pearl, Monarch, Big Theater, Victor Consolidated, Victor Consolidated No. 2, and Apex lode claims, are correctly given therein from the official survey, and that the names of two adjoining unsurveyed claims are also stated. Upon first glance at the printed notice the course in the connection between corner No. 4, as to the Hamburg location, and corner No. 3 of the Dead Pine location, survey No. 7475, seems to read, S. *20* deg., etc., instead of S. *29* deg., etc., the correct course. But upon more careful inspection the second figure in the bearing is clearly shown to be a 9, though imperfectly printed.

The published notice relative to the Hallett location is incorrect in stating the connection to be between said corner No. 1 and the S. $\frac{1}{4}$ corner of section 29, T. 15 S., R. *60* W., instead of R. *69* W., as in the official survey, by a course S. 58° 46′ W. 2231.5 feet, instead of *E.* 2231.5 feet, as in such survey, and in stating the distance in the connection hereinbefore given with the Apex lode to be .79 feet, instead of 379 feet, the true distance; also, as to the Hamburg lode, in stating that the public survey corner to which the claim is tied is in T. *16* S., instead of T. *15* S., and that the course thereto from said corner No. 1 is S. 58° 56′ E., instead of S. 58° *46′* E. It is proper to state further in this connection, that the posted notices give the connections and other data above mentioned substantially as they are given in the first paragraph of the published notice and in the official survey, except that there is a slight error, in the notice posted in the local office, in one of the bearings from corner No. 1 to the corner of the public survey, which error, taken with the correct data therein, would not mislead, and that these notices, under the rule in Gowdy *et al. v.* Kismet Gold Mining Co. (24 L. D., 191), which is evidently the case referred to in appellant's fifth contention, might, therefore, respectively, each in its own sphere, be accepted as meeting the requirements of proper notice. Your office raises no question as to the sufficiency of these particular notices.

The statute (section 2325 Revised Statutes) is silent as to the contents of the notice of application for patent to a mining claim. The only requirements thereof bearing upon the subject are that before

filing the application the applicant shall post a copy of the official plat of survey of the claim "together with a notice of such application for patent, in a conspicuous place on the land embraced in such plat." "An affidavit of at least two persons that such notice has been duly posted." and "a copy of the notice," are then to be filed in the local office. Upon the filing of the "application, plat, field notes, notices, and affidavits," it is required that the register "shall publish a notice that such application has been made, for the period of sixty days, in a newspaper," etc., and "shall also post such notice in his office for the same period."

Paragraphs 29, 35, and 36 of official regulations under the United States mining laws, approved December 10, 1891, contain all the requirements of the land department, relative to the contents of such published and posted notices in force at the time of this application and thence until long after the date of said entry. These paragraphs read:

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode; the mining district and county; whether the location is of record, and, if so, where the record may be found; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, etc.

35. The notices so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim.

36. Too much care can not be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

It is believed to be the intent of the statute (and with this intent the regulations thereunder must be in harmony) that the notice of application for patent, both posted and published, should contain such matter as will inform a man of ordinary intelligence and prudence having an interest in a mining location conflicting with the one applied for, that application is made for patent to the ground in conflict, thereby giving him an opportunity to file and prosecute an adverse claim and thus assert and protect his rights as provided by section 2326 Revised Statutes. If, in any case, a notice contains such information, it is sufficient whether it conforms with every minute requirement of the official regulations or not. Such regulations are prepared and issued as a guide to applicants and the local officers, and are generally in matters of detail, directory rather than mandatory. Although neither the statute nor the official regulations expressly require that the published notice give a connection by course and distance between the claim and a corner of the public survey or a mineral monument, yet it has been repeatedly held, and under the practice of your office and the decisions of the Department has become well settled, that such a connection

should be given therein (Tennessee Lode, 7 L. D., 392; Hoffman *et al. v.* Venard *et al.*, 14 L. D., 45; Broad Ax Lode, 22 L. D., 244; and Sulphur Springs Quicksilver Mine, 22 L. D., 715. However, the only purpose in this requirement is that the land embraced in the application should be identified and made certain. The rule in the Gowdy-Kismet case, *supra* (see also circular instructions of March 11, 1897, 24 L. D., 266), it is proper to remark in passing, is not broad enough to cover the case at bar. While that rule, subject to the time limit therein, excused the absence of certain data from the notices, some of which data are also absent from the notice in question, it did not excuse the absence of a tie to a public survey corner, or a mineral monument. In the Gowdy-Kismet case the claim was tied to a corner of the public survey. Considering the case at bar in the light of these observations and authorities, the question is: Does the notice as published, taken as a whole, and notwithstanding the errors noted therein, indicate the situation of the applicant's claims with substantial accuracy? The Department is of opinion that it does.

As already stated, all the data in the first paragraph of the notice are correct. The locations or claims applied for are therein described as situated in a certain quarter section of public land. There is only needed a tie between a corner of the survey of these locations and a corner of the public survey to enable any one who cares to do so to trace on the ground the boundaries of each location as surveyed and applied for. The boundaries of the locations as published from the field notes show that they lie side by side, corners Nos. 1 and 4 of the survey being common to both claims. The needed tie, though indirectly, still with entire accuracy, is furnished through the connection given above with the patented Dead Pine location, survey No. 7475. This patented claim, as the records show, is duly tied to a corner of the public survey. That is certain which may be made certain, and by means of the connection with the Dead Pine claim and the published boundaries already mentioned, the exact position of the Hallett and Hamburg claims may be as definitely ascertained as if the notice specifically and correctly stated a connection by course and distance directly between them and the public survey corner (Eugene McCarthy, 14 L. D., 105). In the case of S. H. Standart *et al.* (25 L. D., 262) the published notice was held sufficient although in such notice the claim applied for was tied to other officially surveyed claims, only. The decision in that case does not state that any one of the last mentioned claims was duly connected with a mineral monument or a public survey corner, but such was probably the fact in each instance.

It is to be observed that the references in the published notice to the Mammoth Pearl, Monarch, Big Theater, Victor Consolidated, Victor Consolidated No. 2, and Apex, as claims in conflict with one or both of the Hallett and Hamburg locations, in themselves fixed with a considerable degree of acuracy the *loci* of the claims applied for. These

conflicting claims were all situate in T. 15 S., Range 69 W., had been surveyed and platted and were shown upon the permanent records of the local office which were open to public inspection.

It appearing, therefore, that the published notice contained sufficient correct data to enable any one interested to ascertain with accuracy the position of the claims, it remains to inquire whether the erroneous data hereinbefore indicated were such as were likely to mislead and hence such as to vitiate the notice.

The notice must be taken as a whole. If, when so taken, it is misleading, then it fails in the purpose of a notice; but if, taken as a whole, it points out the ground applied for, it is sufficient. This it certainly does unless the erroneous data thwart its purpose. It can not be reasonably doubted that it was the *bona fide* purpose to fully and properly describe the claims in the published notice and that the errors therein were the mistakes of the copyist or printer. It would be plain to any one claiming mining property in the Cripple Creek mining district adversely to the applicants for patent, that the range, *60* W., in the first stated connection in the published notice, is incorrect. No part of Cripple Creek mining district is in range 60 W., which is far to the eastward—out on the prairie—beyond the mining regions of Colorado. Again, the *loci* in range 69 W., as given in the first and third paragraphs, would show that range *60* W. is error, and range *69* W. probably correct, for the reason that the latter embraces part of said district. The course in said first connection, S. 58° 46′ W., is incompatible with the *loci* of the claims in the SW. ¼ of section 29, as given in the first and third paragraphs. Hence there is palpable error in the *loci* or the course, with the strong probability that it is the latter, and it is not likely that any one would rely upon the error to his hurt. It would be incumbent upon him, if in doubt, to look further for correct information, and this he could readily find.

The distance as given between corner No. 1 of the survey and corner No. 3 of the Apex lode is manifest error to any one entitled to notice. It is absurd upon its face that a course and distance should be laid between corners of claims less than one foot apart. No one could be misled by such an error. Township *16* S. is not in El Paso county, and hence no one could be misled by that error in the third paragraph of the notice. The difference of ten minutes between the first bearing in that paragraph and the true bearing, is believed to be too small to be seriously misleading.

This disposes of all the errors in the published notice. It is not shown nor claimed that any one was misled by the notice. On the other hand, it is in evidence that the claimants of the Mohican location were actually brought into court by the notice. They duly filed an adverse claim and prosecuted it to successful judgment. While not necessary to a decision in this case, it is deemed proper to say, in order to correct any misapprehension that might otherwise exist on the sub-

ject presented by appellant's third contention, that in the opinion of the Department neither the law nor official regulations make it the duty of the local officers, or either of them, to prepare the notice for publication. It is expressly provided in the statute that the applicant shall file in the local office a copy of the notice posted on the land and the evident intendment thereof is that such copy shall be filed not later than the filing of the application for patent. Two copies are needed by the register, one for publication, the other for posting in his office. It is immaterial by whom these copies are made. It is *very material* that they be correct and contain the necessary data, also that the copy for the newspaper be correctly published. The actual publication is under the direction and supervision of the register, but whatever may be his share in the responsibility for errors in the publication, the applicant can not avoid the consequence of defects in the notice as published. The proceedings for patent are initiated by him, and are for his benefit, and it is his duty, as well as his privilege, to see to it that all essential requirements are fully met, as well those concerning the publication of notice as those pertaining to every other matter in the proceedings.

The published notice in this case is held to be sufficient, and the decision of your office reversed accordingly.

By the decision of your office an amended survey of the claims was required "under paragraph 50 of mining regulations." This is a matter not involved in the appeal and requires no consideration by the Department.

Your office decision also dismissed the protest of The Calhoun Gold Mining Company, filed January 21, 1897, for the reasons that it was not corroborated and that, "should the required republication be made by claimant, the protestant will have full opportunity to assert any adverse interest of which it may be possessed." The protestant company did not thereafter appeal from such decision, but the second ground upon which the protest was dismissed having been overruled, it is deemed proper, in view of other protests now in the case, to consider the company's protest with the others, notwithstanding the lack of corroboration in the former.

In addition to asserting an adverse interest, as owner of the Ithaca Tunnel lode locations Nos. 2, 3 and 6, in the ground embraced in the Hallett and Hamburg locations, the material allegations of the Calhoun Company's protest are: (1) that there is no valuable mineral bearing lode or vein of rock in place in the discovery shafts of either of the last-named locations; (2) that the northerly corners and end lines of these locations are upon and within patented lode locations; and (3) that the notice of application as published and posted does not contain certain data required by the United States mining law and regulations.

On October 29, 1897, while the said appeal was pending, Thomas L. Darby, representing himself to be one of the owners of the said Ithaca

Tunnel lode locations, filed his duly corroborated protest against the said application for patent. It is therein alleged that said locations conflict with the Hallett and Hamburg locations and that neither the said Hallett and Hamburg company "nor its grantors have ever made a valid discovery of mineral rock in place within the limits of the alleged locations of said Hallett and Hamburg lodes, exclusive of the Orpha Nell lode, Sur. No. 11674, and that therefore the locations made by the grantors of said company were void *ab initio*, and the entry allowed was fraudulent:" wherefore they ask for a hearing. April 15, 1898, the Hallett and Hamburg company filed a motion to dismiss the said protest.

On June 4, 1898, A. B. Beymer, alleging an interest in the Thanksgiving lode claim, and that said claim conflicts with the Hallett and Hamburg claims, filed her duly corroborated protest against the issue of patent to the applicant company, charging (1) defective published notice "in that the connection with a corner of the public surveys was erroneously given;" (2) that "the northerly end lines of the Hallett and Hamburg claims are established within the limits of excluded prior located lode claims;" and (3) that "the southerly end lines of said Hallett and Hamburg lodes are established within the limits of the excluded prior located Mohican lode claim."

In regular procedure all of these protests should first be considered upon the merits by your office, and the Department might now properly remand the case for that purpose, but in view of the action already taken and the importance of the questions presented, and to avoid delay, they will now be considered together here. It will be observed that the Calhoun Company and Darby assert an interest in the same mining properties adverse to the applicants and that the first ground of the company's protest is embraced in the single ground of the protest of Darby. If that allegation could be established as a fact it would vitiate not only the said entry but both locations embraced therein. Such allegation is effectually disproven, however, by the final judgment of the district court in and for the said county of El Paso, rendered April 20, 1895, in the adverse suit of the persons first hereinbefore named as claimants of the Hallett and Hamburg locations against the Victor Consolidated Gold Mining and Milling Company (subsequently the Calhoun Gold Mining Company, protestant here) in which judgment the ground embraced in the conflict between the plaintiff's locations and the Victor Consolidated locations hereinbefore mentioned and embraced in the defendant company's application for patent then pending, was awarded to the plaintiffs. Such judgment is sufficient answer to the allegation under consideration. Upon it and compliance with the further provisions of section 2326, Revised Statutes, plaintiffs might have obtained patent to the ground in conflict wherein are the discovery shafts of the Hallett and Hamburg locations. The question whether there had been a due discovery of mineral upon each of these

locations was necessarily in issue in the adverse suit and an affirmative finding thereon was essential to the judgment rendered. Such judgment is, therefore, accepted by the Department as sufficient to disprove the protestants' allegation of the non-discovery of mineral.

The second allegation of the Calhoun company's protest and the second and third allegations of the Beymer protest are upon the same subject and will be considered together. The ground upon which the northerly and southerly end lines and corners of the Hallett and Hamburg locations are established is not in any instance claimed by the applicant company. It is all excluded from the entry. Each of the claims mentioned in those allegations was located in 1891, and so were older locations than the Hallett and Hamburg. The Apex, Monarch, and Mammoth Pearl locations were patented in 1895. The Mohican was not entered until in December, 1896, and is not yet patented. The question, then, presented by these allegations is whether a junior lode location is invalidated because its end lines and corners are laid within or upon the surface of a valid senior lode location.

This question was considered and answered in the negative by the supreme court in the recent case of Del Monte Mining Co. *v.* Last Chance Mining Co. (170 U. S.,). In that case the supreme court held that—

> Any of the lines of a junior lode location may be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extra lateral rights not in conflict with any right of the senior location.

The third allegation of the Calhoun company's protest and the first of the Beymer protest, together, going to the question of the sufficiency of the notice of application as published and posted, have already been sufficiently answered herein.

The protests are all and singular accordingly dismissed. It is unnecessary therefore to discuss or pass specially upon applicant's motion to dismiss. You will proceed to take such further action in the matter of said entry, not inconsistent with the views herein expressed, as the law and official regulations may require.

APPLICATIONS TO ENTER—ORDER OF PRECEDENCE.

LEWIS *v.* MORRIS.

Applications to enter tendered in person, or sent through the mail, should be acted upon in the actual order of arrival and presentation at the local office; and the refusal of said office to observe such order of precedence will not defeat the right of an applicant to have his application subsequently treated as though acted upon in its proper order.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *June 25, 1898.* (C. J. G.)

September 16, 1893, Julian H. Morris made homestead entry No. 6 for the NW. ¼ of Sec. 28, T. 26 N., R. 2 E., Perry land district, Oklahoma.

September 22, 1893, Benjamin Lewis filed affidavit of contest, alleging settlement on the land described prior to Morris and prior to his said entry.

October 22, 1893, Fred M. Browning also filed affidavit of contest against Morris' entry, alleging settlement on said land prior to Morris or any other person.

A hearing was duly had, beginning March 30, 1894, at which all parties were present. January 15, 1895, Browning withdrew his contest.

The local office rendered decision in favor of Morris, on the ground primarily that Lewis failed to follow up his initial acts of settlement, within a reasonable time, by the establishment of residence and permanent improvements.

August 21, 1895, your office, upon plaintiff's appeal, rendered decision in which it was found that Lewis reached the land in controversy at 1:10 p. m., September 16, 1893, and immediately stuck a stake;

that he carried with him a jug of water and a blanket, and exercised his rights by remaining on the land that evening, warning all persons who came on the tract to keep off, and notifying them that he was the first person on the land and claimed the same; that he followed up his initial act of settlement by locating the lines and corners of the land on the evening of the 16th; that after dark he ate his supper there and then set another stake and started a well near it; that night he went to the railroad station and took the train and arrived at the Perry land office the next morning at 7 o'clock, and then returned to the land to see if he had the correct numbers; that he then returned to the land office and filed this contest; that he returned to the land and had it surveyed, and while there he employed a man and paid him to build a house on the land; that on Sep. 23, following, he went to his home at Galesburg, Ill., in obedience to a summons that his wife was very sick; that he remained with his wife, who required his attention, about six weeks, when he returned to the land and found that the man he had hired had not built the house; that he hired men and worked with them about thirty days building a good house; that he then fenced the claim and had about fifteen acres of the land broken; that he moved his family on the tract Jan. 1, 1894, which was as soon as his wife could with safety be removed; that plaintiff's improvements are worth about $500.

In regard to the filing of Morris' homestead application your said office decision contains the following statement:

It appears from the endorsement on defendant's homestead application, made by the register, that it was received and filed Sep. 16, 1893, at 2 o'clock p. m.

From the evidence of defendant Morris, it appears that he was at the Perry land office at one o'clock P. M., on Sep. 16, 1893, and handed his homestead papers to one of the officers in the office; that the officer took hold of the papers and then shoved them back to defendant, and said that he had mail matter to look after (the mail having just been brought into the office); that defendant told the officer that he, Morris, was ahead of the mail, and the officer replied that, Morris, could claim the time, but the mail must be examined first, that defendant stood by the window of the office about one hour before the officer received the papers from defendant.

Upon this statement your office concluded that

the controlling question in this case is whether defendant Morris is entitled to have his entry dated back to one o'clock p. m., September 16, 1893; whether the actual tender and conditional acceptance of the papers at that time amounted in law to an entry.

Applying the rule contained in the syllabus of Dunn *v.* Shepherd *et al.*, 10 L. D., 139, which is,

> Papers presented for filing, but refused by the officer on account of the pressure of business, should be held as filed of the date when presented,

Your office held that Morris' entry should date back to one o'clock p. m., September 16, 1893, and was therefore prior to Lewis' settlement. The decision of the local office was accordingly affirmed and Lewis' contest dismissed.

September 18, 1895, Lewis filed in your office a motion for review; and in support thereof he submitted the certificate of the register of the Perry land office, wherein the latter states that the homestead applications of eleven parties were received at 1:20 p. m. the afternoon of September 16, 1893, as shown by the rejection docket kept in that office, and that they were the only mail filings of which that office had any record bearing that date. In further support of said motion attention was called to Morris' testimony at the hearing when he testified that

> I saw a man coming through the room of the office with a bundle of papers, it was an envelope that had papers in it, and I handed my filing to the officer and he caught hold of it and shoved it back to me and said he had mail matter to look after.

As evidence of the fact that these mail filings were received at 1:20 p. m., reference is made in the motion to the case of Parker *et al. v.* Lynch, 20 L. D., 13, the said Lynch, it is asserted, being one of the parties whose applications were received at the time testified to by Morris.

Attention was also called to the testimony of one James A. Donegan, a clerk in the Perry land office, who states that "entries numbers 1, 2, 3, 4, 5 and 6 were made respectively at 12:40—12:45—12:50—1:05—2: and 2 o'clock p. m. on September 16th, 1893."

In view of this showing your office, on November 16, 1893, decided as follows:

> The said certificate of the register, showing when the eleven mail filings were received, was not referred to in the trial of the case, either by the parties or by your office. Had that fact been brought to the knowledge of this office, it is probable that the decision would have been different, because this office should take judicial notice of its records and it is not absolutely necessary for the contestant to offer the records of the local office in evidence. See case of Kime *v.* Smith, 19 L. D., 207.
>
> If Morris' application to enter was not offered, and he testifies that it was not, until the time those mail filings were received, which was 1:20 p. m., as shown by the records of your office, and if Mr. Lewis settled on the land at 1:10 p. m., which seems to be clearly shown by the evidence then Lewis is entitled to the land and the motion should be and is hereby granted.

It appears that prior to granting Lewis' motion for review your office received a letter from Morris' attorneys requesting postponement of action on said motion in order that they might have time to submit certain evidence as a counter showing. This letter was returned for want of service on the plaintiff.

November 19, 1895, your office received from the local office the "counter showing" filed by defendant, consisting of the affidavits of himself and one D. C. Pryor, who, as agent, delivered the applications, for transmittal by mail, at the Perry post office on the day of the opening of the land, and the statement of the register of the Perry land office at the time of this hearing, who was, on September 16, 1893, a clerk in said land office, made in answer to certain interrogatories.

March 2, 1896, the local office transmitted defendant's petition for reconsideration or rehearing. In support of said petition is filed the affidavit of J. O. Severns, one of the parties in line with Morris on the day of the opening, who states among other things that at about 12:45 p. m. the land officials ceased to receive filings from the line, the cause of which he learned was the receipt of certain filings by mail; also a certified "extract from the receipts for special delivery of articles of mail matter delivered at the post office at Perry, Oklahoma, during the quarter ending September 30, 1893," now on file in the office of the Auditor for the Post Office Department, showing the receipt of the register J. E. Malone for package No. 1, addressed to the register and receiver at Perry, mailed at Perry, and delivered at 12:45 p. m., September 16, 1893. In further support of said petition the defendant set out that at the hearing he showed by the testimony of himself and A. M. Waugh that he tendered and delivered his homestead application to the register prior to 1:05 p. m., on the day of the opening; that plaintiff did not offer any evidence or refer to any record of the local office whatever to disprove this fact, until he filed his motion for review. The petitioner also explains the length of time it required to procure evidence to establish the time the mail filings referred to were delivered in the local office. It was furthermore set out that petitioner could now show that the mail filings were in fact delivered to the register prior to 1 o'clock on the day of the opening; that immediately thereafter the applicants in line became excited and turbulent and threatened to overturn the land office and do other acts of violence if their filings were not received in preference to the mail filings; that in consequence of this disorder and excitement the local officers were not able to examine and act upon said mail filings until some time thereafter; that Samuel A. Akins, who made homestead entry No. 5, presented his application some time before 1 o'clock, but it was returned to him for the correction of some defect, and when filing was resumed he and petitioner re-presented their applications simultaneously; that petitioner has never known that the evidence he now offers to introduce was material in the case; that he is greatly prejudiced by the action granting the motion for review, in that it was taken and had upon new evidence in no wise in the original record. It is requested also that the "counter showing" be considered in support of the petition for reconsideration or rehearing.

Pryor in his affidavit states that he delivered the package containing the applications to the postmaster at Perry; and that he saw the said

postmaster take the said package into the land office and come out without it prior to 1 o'clock.

March 14, 1896, the plaintiff moved the dismissal of defendant's "motion" on the ground that said motion was filed out of time and no appeal had been taken within the prescribed time.

In the defendant's petition it is insisted that the transcript from the rejection docket of the local office should not have been considered as evidence in this case.

July 16, 1896, your office in passing upon the matters herein outlined concluded as follows:

> The doctrine enunciated in the case of Kime *v.* Smith (*supra*), that "the Department will take judicial notice of its own records in deciding cases," is not, and certainly was not thereby intended to be made general in its application, but is to be confined in each to such records in other cases, between the same parties or relative to the same matters of controversy as are specially called to the attention of the local office, by the pleadings or otherwise, at the time of the trial. To extend the application of the rule to all the records of the Department, without any limitation would be neither safe nor practicable.
>
> The defendant was not a party to the record as to the applications of Lynch and others, nor was he bound to take notice thereof. It has no relation to the land in controversy and is not referred to at all in the pleadings. It was neither offered in evidence nor, in any manner, called to your attention at the time of the trial. Hence it should not have been considered as in evidence by this office, in passing upon said motion for review.

Your office accordingly revoked the decision of November 16, 1895, dismissed Lewis' motion for review and adhered to the decision of August 21, 1895, in favor of Morris. The case now comes to this Department upon Lewis' appeal.

The details of this case are thus set out at length for the purpose of exhibiting its history, but with no intention of considering its varied phases. The evidence at the hearing establishes the fact that Lewis reached the land in controversy as early as 1:10 o'clock p. m. on the day of the opening and at once performed such acts as, under the rules governing settlement in Oklahoma, were sufficient to initiate a claim. The Department is likewise of opinion, after careful consideration and under all the circumstances, that Lewis followed up his initial acts of settlement by permanent residence and substantial improvements with such diligence as fairly indicates a *bona fide* intention to make this land his home. Morris having an entry of record, it therefore becomes necessary to determine whether said entry was made prior to Lewis' settlement.

The homestead application of Morris is indorsed as having been received and filed in the local office at two o'clock p. m., September 16, 1893. Morris testified, however, that he was at the office as early as one o'clock p. m. on that day and offered his application papers to an officer who took hold of them but immediately handed them back to applicant with the explanation that he had mail matters to look after. The mail filings are indorsed as having been received at 1:20 o'clock

p. m., whereas the register's receipt shows them to have been delivered in the local office at 12:45 o'clock p. m. Giving equal weight to these records as tending to show the time when Morris first presented his application, it is plain to see that the exact time can not be arrived at from this evidence. Morris testifies that a few minutes after offering his papers to the officer he looked at his watch and it was then 1:05. A. M. Waugh, one of his witnesses, testifies as follows:

> I saw Morris tender his papers to Mr. Malone at the window, I think he said he demanded or insisted that they be received. Mr. Malone must have refused him and Mr. Morris called on me and Mr. Severns of Guthrie, who was directly behind me, to witness that he had offered his papers at 1:05, and I looked at my watch and saw that I had that time. I believe Mr. Severns did the same.

As previously set out herein, Severns testifies, among other things, that about 12:45 p. m. the land officials ceased to receive filings from the line, the cause of which he learned was the receipt of certain mail filings. Attached to plaintiff's brief filed in this Department are several affidavits, including one from register Malone, in which it is denied that Morris handed his papers to that officer and had them handed back.

It is the opinion of this Department that, if at the time the filings by mail were received in the local office Morris was actually standing in line before the window and tendered his application or was in readiness to tender his application, there can be no good and sufficient reason why the same was refused. And if Morris' place in line had been reached in regular order prior to 1:10 o'clock p. m., the time of Lewis' settlement, then he is entitled to have his entry remain intact.

The transmission of homestead applications by mail is clearly permissible, but it was evidently not intended to confer upon such applicants a superior right; only that they should be accorded an equality of access with those who present their applications in person. If applications transmitted by mail should be taken up and disposed of the moment they are received, to the exclusion of those ready and waiting to be filed in person, the former would have a vast advantage and a premium would thus be placed upon this mode of filing. So that, in order to secure equality of access to the two kinds of applications, the most that could be claimed for mail filings is such advantage as would be gained by one person in line over another who presents himself later. In the regular order of things the late comer would take up his position at the end of the line to await his turn. The same equality would be preserved with regard to mail filings by noting the number of persons already in line and giving said filings the next number, to be taken up and acted upon when reached in regular order to the exclusion of those who might in the mean time have formed in line. In this way no undue advantage would be given those applying through the mails, nor any delay occasioned those already in line. But there is no just warrant for postponing those in line by taking up the mail filings in advance.

In this view it is sufficient to know that Morris was already standing in line ready to present his application at the time the officials refused to receive further applications from those in line on account of the receipt of the mail filings; and that it was prior to 1:10 p. m. The Department is of opinion that the preponderance of the evidence shows this to be the fact. Aside from the evidence to that effect, it is to be presumed that the local office was open promptly for the transaction of business at 12 o'clock noon on the day of the opening. Morris was number six in line, which shows that he must have been at the office soon after it was opened. There is no doubt that he was in line at the time the mail filings were taken up, and, as stated, the preponderance of the evidence is to the effect that this was prior to 1:10 p. m., the hour of Lewis' settlement.

For the reasons stated herein, without considering the affidavits filed since the hearing, the conclusion reached in your office decisions of August 21, 1895, and July 16, 1896, is hereby affirmed, Lewis' contest is dismissed and Morris' entry will remain intact subject to compliance with law.

PUBLIC SURVEY—FICTITIOUS MEANDER LINE.

W. L. HEMPHILL ET AL.

Land excluded from the public surveys by the establishment of a meander line of an alleged body of water that in fact did not exist at the time of such survey, should be surveyed and disposed of under the public land laws.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 25, 1898.* (C. W. P.)

In the case of William L. Hemphill and others, by departmental letter of March 8, 1898 (26 L. D., 319), you were directed to send a special agent to the locality in question to make an examination relative to the government survey of certain land in the State of Iowa, which it is alleged in the application for survey of said William L. Hemphill and others is more than five hundred acres and has never been surveyed by the government.

This land is situated in sections 19, 20, 29 and 30, township 97 north, range 34 west.

Upon the request of your office, the Department, by letter of March 17, 1898, detailed Amherst W. Barber, a clerk in your office, to make the investigation and survey.

With your letter of June 13, 1898, you transmit the report of Mr. Barber, dated April 22, 1898, and accompanying papers. The land in question is represented by the township plat as part of a lake described in said plat, and the public surveys as closed therefore excluded or omitted them. Mr. Barber in his report states, as the result of his investigation and survey, that he has arrived at the conclusion that

the land in sections 19, 20, 29 and 30, township 97 north, range 34 west, and a portion of the land in sections 25 and 36, township 97 north, range 35 west, were erroneously returned by the deputy surveyors in 1855 as covered by a lake: that there is no reasonable doubt that the pretended meandering of a lake was improper and almost wholly fictitious, and that the land should be surveyed and disposed of as public lands. With his report Mr. Barber submits a plat showing that the land in question is mostly agricultural in character, with a wet marshy pond, called Mud Lake, covering portions of sections 25 and 30, with an outlet flowing west and into Trumbull Lake. He also shows that there is a permanent body of deep water in sections 31 and 32, township 97 north, range 34 west, separated from the land to the north by a sand ridge twelve feet high, and presents an affidavit by residents of the locality for fifteen years to the effect that there is no channel through the said ridge, by which water appears ever to pass between the deep, permanent waters of Lost Island Lake and the grassy flats and shallow flag ponds north of the ridge; that there was a stage road east and west on the ridge in 1868, which the original plat showed was covered with water. These affiants also state that the marsh covering the land in question has only been covered with water once in the last fifteen years, and then after a rainy spell: and that the lake land in section 30 is mostly in the same condition, except a tract further west, known as Mud Lake, which is all liable to become entirely dry every dry season.

In his survey Mr. Barber has re-established the meander corners as originally established, and has segregated by running the original meander lines, the land as shown to exist in 1855, from that added by his survey, and has shown the areas of lots and the land which may be considered swampy in its character, the latter covering most of the added land in sections 30 and 25, and known locally as Mud Lake.

From his report it appears that there have been surveyed by him 1,230 acres additional, of which he returns 533.71 acres as swamp land and the remainder as farming land free from swamp or overflow.

In your office letter you state that "from the conditions shown to exist by Mr. Barber's report and survey," you are of opinion "that these lands should have been surveyed as public lands in 1855, and that the survey executed by Mr. Barber should receive the approval" of your office "as showing the conditions existing on the lands embraced therein."

I see no reason why the survey executed by Mr. Barber should not be approved and the land disposed of as government lands.

MINING CLAIM—PLACER ENTRY—AMENDED SURVEY.

KIMBERLY PLACER.

A deed to the State of a part of the land embraced in a placer entry makes an amended survey of the mining claim necessary prior to the issuance of a patent thereon.

Secretary Bliss to the Commissioner of the General Land Office, June 28, 1898.

(W. V. D.) (P. J. C.)

It appears that R. R. Williams *et al.* made mineral entry No. 497 of the Kimberly placer mining claim, survey No. 8170, Gunnison, Colorado, land district. The State of Colorado protested against the entry to the extent of that portion of it which was included in section sixteen. A hearing was ordered, but the mineral claimants deeded to the State that part in conflict, whereupon the State dismissed its protest.

By decision of November 6, 1896, your office held that the conveyance to the State is an admission of the non-mineral character of the land in conflict, and in view of this directed that the claimants be given sixty days' notice in which to show cause why the entry should not be canceled to the extent of the conflict, and in case of default the entry would be canceled to that extent and an amended survey required eliminating the conflicting ground.

In response to this the affidavit of one of the mineral applicants was filed, wherein it is stated that the compromise was made solely for the reason that the amount of land in dispute was so small that its value was much less than the expense of procuring testimony, and that "the question of the character of the land was not even referred to in the negotiations."

Your office, by decision of December 7, 1896, held the entry for cancellation as to the conflict with section sixteen and said: "Should this decision become final, an amended survey will be required eliminating therefrom the conflicting ground."

The appeal of the mineral claimants brings the matter before the Department, and it is alleged that there was error (1) in deciding that so much of section sixteen as conflicted with the entry should be canceled, and (2) in requiring an amended survey.

In your office judgment no reason is assigned for the cancellation of the entry as to section sixteen, but it was probably because the sixteenth and thirty-sixth sections were granted to the State by Congress for school purposes. This grant is held to be a grant *in præsenti*, and can only be defeated by a showing made that the land embraced therein is not of the character contemplated by Congress, and known to be such at the date of the approval of the survey. An opportunity has been offered the mineral claimants to show this, but instead of so doing they have deeded the land to the State. This act, so far as the government is concerned, amounts to a relinquishment of the land in con-

flict which is included in the survey, and since the patent must issue on the survey, that is, the description contained therein must be taken from the field notes of the survey, it is necessary to have amended field notes and plat showing accurately the ground sought.

The question involved here is not, as counsel spiritedly suggests, as to whether an entryman may convey a part of his mineral claim between entry and patent, but whether there shall be a correct survey of the land claimed.

The judgment of your office is affirmed.

RAILROAD GRANT—INDEMNITY SELECTIONS—RESERVED LAND.

SOUTHERN PACIFIC R. R. CO.

An application to make indemnity selection of unsurveyed lands confers no right upon the railroad company.

Lands embraced within the limits of a forest reservation, established by order of the President, are not subject to indemnity selection.

Secretary Bliss to the Commissioner of the General Land Office, June 28, 1898.

(W. V. D.) (L. L. B.)

The plat of survey of the lands embraced in indemnity list No. 77 of the Southern Pacific Railroad Company was filed in the local office at Los Angeles, California, July 20, 1896. August 31, 1896, the company presented its said list, which was accepted by the register and receiver. By your office decision of October 10, 1896, said list was held for cancellation, because the land embraced therein, together with other lands, had been set apart by proclamation of the President of date February 25, 1893, for the San Bernardino forest reserve.

The company has appealed from said action of your office.

The land is within the indemnity limits of the grant to said company.

It appears that the company had previously (and prior to the reservation for forest purposes), applied to select this land, as per list No. 26, presented October 3, 1887, which was prior to the survey, and for that reason its said list was rejected by the local officers, and on appeal their action was affirmed by your office and this Department.

It is insisted by counsel for the company: 1st, That list No. 77, presented August 31, 1896, should be held to be the "completion of the company's right of selection, as initiated by its application of October 3, 1887;" and 2nd, That the President's proclamation of February 25, 1893, did not operate to reserve the land from selection by the company.

As to the first contention, this Department has repeatedly held that unsurveyed lands are not subject to selection (see Atlantic and Pacific R. R. Co., 8 L. D., 307; on review, 10 L. D., 214; Northern Pacific R. R. Co., 15 L. D., 8; Southern Pacific R. R. Co., 18 L. D., 314), and that

being the condition of the land at the date of the company's first application to select, it must follow that such application was without force and could not serve to initiate or preserve any rights to the company.

The position assumed by counsel in his second specification of error, to wit, that the lands were not reserved from selection by the proclamation, is equally without force. The language of the proclamation is "that there is hereby reserved from entry or settlement and set apart as a public reservation all those certain tracts," etc. These are the usual terms of all proclamations setting apart lands for public purposes, and it would be doing violence to reason to presume that the President, in reserving this land, intended to except from such reservation every odd-numbered section, to await the selection of the railroad company. Such a construction would, if adopted, not only practically destroy the purposes of the reservation, but might greatly impair the benefits to the company, intended to be conferred by the right to select indemnity for lands lost in place. The title to every alternate section included within the boundaries of the reservation would be barren of profit to its possessor, for the land could neither be utilized nor sold to advantage, on account of its inaccessibility by reason of the reservation of the neighboring sections, every section being surrounded on all four sides by reserved land.

Indemnity list No. 77 having been improperly accepted at a time when the lands therein embraced were reserved by proclamation of the President of a date anterior to such presentation and acceptance, you will direct that it be canceled.

The decision appealed from is affirmed.

DESERT LAND ENTRY—COMPACTNESS—CHARACTER OF LAND.

CHARLES G. JOHNSON.

The non-irrigable character of adjacent tracts may be properly considered in determining whether a desert land entry is within the rule as to compactness.

A desert land entry should not be allowed of land on each side of living water, in the absence of the clearest proof of the desert character of the land.

Secretary Bliss to the Commissioner of the General Land Office, June 28, 1898. (P. J. C.)

(W. V. D.)

It appears that Charles G. Johnson made desert land entry September 11, 1895, for S. ½ NW. ¼; W. ½ SW. ¼, Sec. 22; SE. ¼ SE. ¼, Sec. 21, and N. ½ NE. ¼, SW. ¼ NE. ¼, Sec. 28, T. 29 N., R. 62 W., Cheyenne, Wyoming, land district, and submitted his first yearly proof September 1, 1896.

By the plat filed by the entryman at the time he made the entry it is shown that the land extends in a northeasterly and southwesterly direction one and a half miles; its greatest width is one-half mile, and

through the center of the tract is marked a stream called "Red Cloud slough." On the official plat on file your office this is called "Marshy slough."

The "proposed plan for irrigating" the tract is by the construction of four dams across this slough, with four ditches on each side thereof running easterly and westerly.

In your office decision of September 22, 1896, it is said:

> The regulations of the Department relating to compactness are as follows:
>
> The requirement of compactness will be held to be complied with on surveyed lands when a section, or part thereof is described by legal subdivisions as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit, although parts of two or more sections may be taken to make up the quantity, or equivalent of one section.
>
> But entries running along the margin, or including both sides of streams, or being continuous merely in the sense of lying in a line so as to form a narrow strip, or in any other way showing a gross departure from all reasonable requirements of compactness, will not be admitted. . . .
>
> The entry in question runs along the margin on both sides of a stream for a distance of one and one fourth miles.
>
> You will inform the claimant that he will be allowed sixty days from notice within which to adjust his entry so as to make it a consolidated body, by the relinquishment of a subdivision or subdivisions not containing his principal improvements, and to take in lieu thereof, if he so desires, by amendment of his application (to be granted by this office), any vacant tract or tracts which would make the entry compact; provided he shows by affidavit, corroborated by two witnesses, that the same is desert in character, or to appeal from this decision; that if no action is taken within the time specified his entry, which is held for cancellation, will be canceled without further notice from this office.

The entryman appealed and with his appeal is his corroborated affidavit by which it is shown that the land on both sides of his entry are bluffs so high that it would be impossible to get water on it; that to comply with the order of your office would force him to take land that he could not reclaim; that the only land that can be reclaimed in these sections is included in his entry; that taking the land in the shape he has will work no hardship or injustice to anyone "as the land that surrounds it can never be of any use, other than for grazing purposes," and that he has spent $500 in reclaiming the land and has "done work on every forty acres of the said tract."

Sec. 1 of the act of March 3, 1877 (19 Stat., 377), provides, among other things, "that no person shall be permitted to enter more than one tract of land, and not to exceed six hundred and forty acres, which shall be in a compact form."

It has been repeatedly held by the Department that each case presenting this question must be determined by the circumstances surrounding it,

> and whether an entry should be regarded as sufficiently compact to answer the requirements of the law must depend largely upon the nature and location of the land, its means and facilities for irrigation and the rights of adjacent and surrounding entrymen. (William H. Wheeler, 22 L. D., 412.)

The test in all the adjudicated cases in regard to making the entry in compact form seems to have been largely with respect to the rights of surrounding entrymen, and where the form of the entry could not be changed because of the prior appropriation of adjacent lands the entry has been allowed to stand. (See Wm. Thompson, 8 L. D., 104, where the earlier departmental decisions are collected and commented on; William H. Wheeler, *supra*.) While in the case at bar it is not shown that any such difficulty exists to prevent a reasonable degree of compactness, yet it is shown that the surrounding land is not susceptible of irrigation owing to its elevation. It would be an idle ceremony to require a person to include in his entry, even for the purpose of making it compact in form, land that it is impossible to reclaim.

The form of the tract under consideration is substantially as compact as were the entries allowed in the cases above cited, and while it is believed that the extreme limit of irregularity in shape has been reached in the allowance of this entry, yet the impracticability of making it more compact is a sufficient reason for not disturbing it.

The more serious objection to the entry is the fact that it is located on each side of what is, apparently, living water.

The General Circular (issue of October 30, 1895, second edition, page 38), following the circular of June 27, 1887, 5 L. D., 708, provides that—

> Lands bordering upon streams, lakes or other natural bodies of water, or through or upon which there is any river, stream, arroyo, lake, pond, body of water, or living spring, are not subject to entry under the desert land law until the clearest proof of their desert character is furnished.

In the application to enter this tract it is stated—

> That said land borders on Red Cloud slough and on both sides of said slough. . . . . Red Cloud slough passes through the entire distance, but does not irrigate any portion of the land outside its natural boundaries; that said land is not naturally irrigated or watered nor overflowed at any season of the year by the foregoing or any natural stream, spring or other body of water; that I expect to obtain my water supply to irrigate said land from Red Cloud slough.

Under the conditions that are met with here it is not considered that "the clearest proof" of the desert character of the land has been furnished.

In view of the fact that this entry was allowed by the local officers, and by reason thereof the entryman has, in good faith, expended considerable money in the preparation of his system of irrigation (his second annual proof has been forwarded since the appeal), and the further fact that the entry seems to be substantially in conformity with the former decisions of the Department as to compactness, your office decision is vacated with directions, however, to require the entryman to make further showing, to the satisfaction of your office, in regard to the desert character of the land at the time of his entry, in accordance with the requirement of the General Circular above quoted.

It is so ordered.

RIGHT OF WAY—RESERVOIR—SURVEY—INCORPORATION.

LONG'S PEAK RESERVOIR AND IRRIGATION CO.

Slight variances between the line of survey, and the actual water line of a proposed reservoir, do not require the rejection of the map, where it appears that such variances are due to the mountainous character of the land.

The admission to record of articles of incorporation, and the certificate of the proper officer in attestation of such fact, establishes the sufficiency of said articles under the statutes of the State, and fixes the status of an incorporation, as such, that applies for a right of way under the act of March 3, 1891.

Secretary Bliss to the Commissioner of the General Land Office, June 29, 1898.

(F. L. C.) (A. M.)

Under cover of your letter of the 6th instant you submitted a certified copy of the articles of incorporation and proofs of the organization of The Longs Peak Reservoir and Irrigation Company; also a map and field notes showing the definite location of the company's reservoirs Nos. 1 and 2 embracing 17.26 and 18.01 acres, respectively, in section 18, township 3 north, range 73 west, Colorado.

The papers and map are filed to secure the right of way conferred by sections 18 to 21, act of March 3, 1891 (26 Stat., 1095).

You have stated that the survey of the reservoirs is not altogether satisfactory but that the errors are small and that it seems from the statement supplied by the engineer in charge that in view of the difficulties encountered, the survey was the best that could be made without involving unreasonable expense.

Attention is also directed in your letter to the failure of the articles of incorporation to specify the source of the water supply, the place where it is taken, the location of the reservoirs and the use to which the water is intended to be applied. On this point it is stated that as the articles have been admitted of record by the Secretary of State of the State of Colorado your office is in doubt whether the question of their sufficiency can now be raised.

The locality of the proposed reservoirs is shown to be rugged and mountainous and the sworn statement of the engineer as to the water lines of the reservoirs is that "they are run as nearly identical with the contours thereof as is possible owing to the great slope of the ground and the fallen timber which obstructs it."

Section 8 of the circular under the above act (18 L. D., 168), requires "that the line of survey should be . . . . . as exactly as possible the water line of the proposed reservoir."

Taking into consideration the character of the country, the above requirement appears to have been complied with and any slight variation between the actual water line and the survey lines will be adjusted by the actual construction of the reservoirs. The slight discrepancies

in the survey, in view of the locus, are not deemed sufficient to warrant a rejection of the map.

The information omitted from the articles is supplied in the shape of a statement filed by the company with the State Engineer and among the papers submitted is a copy thereof certified, under seal, by the State Engineer, to be a correct copy of the statement as it appears of record in his office.

The sufficiency of the articles of incorporation under the Statutes of the State of Colorado is established by their admission to record and by the certificate of the Secretary of State in attestation of that fact.

As the status of the company as an incorporation under the corporation laws of the State has been established by the proper State officer the company appears to be such a one as is mentioned in section 18 of the above act.

The applicant has certified that the right of way is desired for the sole purpose of irrigation and in accordance with the foregoing view and with your recommendation I have approved the map and return it and the papers herewith for filing.

PATENT—PROTEST AGAINST DELIVERY—PRIVATE LAND CLAIM.

SANCHEZ *v.* DAVIS.

A protest against the delivery of a patent regularly issued on a confirmed private land claim, filed by one who alleges an adverse interest in the land covered by said patent, presents no question within the jurisdiction of the Department, if no equities are shown by the protestant that warrant the Department in advising suit to vacate the patent.

Secretary Bliss to the Commissioner of the General Land Office, July 1, (W. V. D.) *1898.* (L. L. B.)

By your office letter of August 5, 1896, to the United States surveyor general for the State of Florida, patent theretofore issued was directed to be delivered to Waters S. Davis, for one hundred and seventy-five acres of land situate on the southern end of Key Biscayne, in T. 55 S., R. 42 E., Tallahassee, Florida, which said land is known and designated as the Mary Ann Davis claim, by deraignment from Peter Formills, the original grantee from the Spanish government.

Venancio Sanchez has appealed from your said office decision, claiming in his appeal that he is entitled to a one-half interest in the said grant by reason of certain muniments of title derived from Dona Antonia Persila de Barrosa *et al.*, who, it is claimed, were entitled to the said one-half interest as heirs of the said Formills, the original grantee.

From your said office letter it clearly appears that the said grant was confirmed to Mary Ann Davis by the board of commissioners created by act of Congress of March 3, 1823 (3 Stat., 754), who were

thereby clothed with full power to take evidence, ascertain and determine the rightful heirs and assigns to this and other Spanish grants in east Florida, and had the

power, any law to the contrary notwithstanding, of deciding on the validity of all claims derived from the Spanish government, in favor of actual settlers, when the quantity claimed does not exceed three thousand and four hundred acres; [and also] when the claimant or claimants shall produce satisfactory evidence of his or her or their right to the land claimed. See second section of said act.

The board so created found in relation to the claim in controversy, that—

Formills and his wife having died, the land descended to Andrews, who sold and conveyed the same to claimant: we deem the grant a valid one and confirm it to Mrs. Davis.

W. S. Davis, to whom the patent was directed to be delivered, is the heir of the Mrs. Mary Ann Davis, above named confirmee.

The decision of the board confirming the grant to Mrs. Davis was afterwards approved by act of Congress (4 Stat. 202), quoted in your said office decision. This act also provided that the register and receiver to be appointed for the eastern district of Florida should thereafter perform the duties that had hitherto devolved upon the said board of commissioners, and it was made their duty—

to examine and decide all claims and titles to land in East Florida *not heretofore decided by the late board of commissioners*, subject to the limitations and in conformity with the provisions of the several acts of Congress providing for the adjustment of private land claims in Florida. (4 Sec. said act.)

The act is entitled: "An act to provide for the confirmation and settlement of private land claims in East Florida and for other purposes," and was passed February 8, 1827.

Subsequently, January 23, 1832 (4 Stat., 496), Congress enacted—

That all patents that are, or may be, by law, directed to be issued on private land claims confirmed by the commissioners of private land claims, and by the several acts of Congress approving their reports and confirming the titles to lands in the territory of Florida, shall be, and they are hereby, required *to be issued to the confirmees, or to the assignee, or present owner*, where the land has been sold or transferred since the confirmation of the title; and it shall be the duty of the commissioner of the general land office, upon the production of satisfactory proof of the death of the confirmee, or upon the production of a regular chain of title from the confirmee, to cause the patent to be issued to the heirs, the legal representatives, or to the *assignees of the confirmee*, as the case may be.

These several acts of Congress plainly prescribe the duty of your office and this Department in the matter under consideration, namely, to issue patent to the *confirmees of the board, or their assigns*, etc.

But even in the absence of these confirmatory statutes, when the patent to this land has been—

signed by the President, sealed with the seal of the General Land Office, countersigned by the recorder of the land office and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the Government of the United

States and needs no further delivery or other authentication to make it perfect and valid. In such case the title to the land conveyed passes by matter of record to the grantee, and the delivery which is required when a deed is made by a private individual is not necessary to give effect to the granting clause of the instrument. · · · After this they can only be revoked or annulled by *scire facias* or other judicial proceedings. (United States *v.* Schurz, 102 U. S., 378.)

In the same case it is also said (page 396):

But we have also held that when, by the action of these officers and of the President of the United States, in issuing a patent to a citizen, the title to the lands has passed from the government, the question as to the real ownership of them is open in the proper courts to all the considerations appropriate to the case.

The only jurisdiction this Department could possibly exercise over this land in controversy, would be to request the United States to bring suit in court to set aside or annul the patent, or to cause an undivided half of the title conveyed by the patent to be held in trust for the appellant on account of some equitable circumstances which entitle him to such relief.

No equities are presented in the protest by Sanchez against the delivery of the patent to Davis that will warrant this Department in making such request.

If it be true, as claimed by Sanchez, that he is entitled to a one-half interest in this grant, his claim must be preferred before the courts and not this Department. In fact, the act of February 8, 1827, above cited, and which confirmed all the acts of the board of confirmation, expressly provides, in the second section,—

That nothing in the foregoing sections shall be construed to prevent or bar the judicial decision between persons claiming titles to the lands confirmed.

The decision appealed from is affirmed.

MINING CLAIM—PLACER LOCATION—DISCOVERY.

FERRELL ET AL. *v.* HOGE ET AL.

One discovery of mineral is a sufficient basis for a placer location of one hundred and sixty acres by an association; but if it is subsequently shown that any area of such claim, amounting to a legal subdivision, does not contain, or is not valuable for mineral, such land must be excluded from the entry.

Secretary Bliss to the Commissioner of the General Land Office, July 1, 1898.

(W. V. D.) (P. J. C.)

The land here involved is the Horse Shoe placer mining claim, survey No. 2602, Helena, Montana, land district, of which Hoge *et al.* made mineral entry No. 209, on January 6, 1890. The earlier history of this controversy will be found in 18 L. D., 81, and only such brief statement will be made now as to render this decision intelligible.

Ferrell and others protested against the entry, alleging, among other things, that the claimants have not acted in good faith in that they are

seeking to obtain title to land as a placer mine that has value only as building sites, owing to its contiguity to the town of Anaconda.

A hearing was ordered and had, and coming before the Department on appeal it was held that inasmuch as there was shown to be but one discovery of this placer claim containing one hundred and sixty acres, the location was void, except as to the land immediately surrounding the discovery.

A motion for review of that decision was filed, and while the Department adhered to the former decision as to the discovery, the mineral claimants were, at their request, given the privilege of making a further showing as to a discovery on each twenty acre tract included in their entry. (19 L. D., 568.)

A hearing was therefore ordered. The testimony was taken before a notary public, at Anaconda, and on consideration of the same the local officers found that there had been a discovery of limestone or sandstone on each twenty acre tract, and recommended that the protest be dismissed and the entry passed to patent.

The protestants appealed. Before a decision was rendered in your office, the Department decided the case of Pacific Coast Marble Company *v.* Northern Pacific *et al.* (25 L. D., 233), in which it was held (syllabus):

> Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

Also the case of Union Oil Company, on review (25 Id., 351), in which the doctrine announced in the case at bar was overruled, and it was decided (syllabus):

> Under the mining laws of the United States but one discovery of mineral is required to support a placer location, whether it be of twenty acres, by an individual, or of one hundred and sixty acres, or less, by an association of persons.

Under the ruling in these two cases, your office, by decision of November 27, 1897, decided that all the land included in the location was subject to entry, under the mineral land laws.

The protestants prosecute this appeal, assigning numerous grounds of error.

The certificate of location of the Horse Shoe placer contains this declaration:

> The locators herein have discovered a deposit of lime and iron rock valuable for fluxing purposes within the limits of this claim, above described, and it is their intention to hold and work the same, etc.

The real contest at the last hearing narrowed down to the discovery of limestone, or building stone, as the mineral claimants now assert the deposit to be, on what, for the purposes of convenience in the trial, the mineral claimants, on their plat in evidence, denominated the Heel Calk subdivision of the Horse Shoe placer—that is, the extreme

northeasterly twenty acres. The evidence introduced by the protestants was confined to this particular tract, but little attention being paid to any other portion.

In view of the recent rulings of the Department in the cases referred to in the decision of your office, it is not necessary now to determine whether or not there was a discovery on each twenty acres. It was conceded in the former decision in this case that there was one discovery of limestone, and, under the present departmental construction of the law, this is sufficient upon which to make a location by the required number of individuals, of one hundred and sixty acres. But, if it is shown that any area amounting to a legal subdivision does not contain, or is not valuable, for the deposit for which the location was made, it is competent for this to be shown by protestants. The burden of proof is, however, on the protestants to show that the parcel attacked does not contain the deposit, and that it is not mineral land within contemplation of the statute.

It is shown by a fair preponderance of the testimony that there is no limestone on the so-called Heel Calk sub-division of the Horse Shoe placer. The mineral claimants offer no testimony that tends to establish the presence of limestone thereon, so far as any development is concerned. They have a theory that it underlies the surface, but this is not sufficient to fix its character.

There was an effort made to show that on this particular tract there was a deposit of sandstone that might be valuable for building purposes, if developed to a sufficient depth. The evidence on behalf of the protestants, however, clearly establishes the fact that it is practically valueless. The sub-division designated as Heel Calk will therefore be excepted from the entry.

Your office judgment is modified to this extent, but in other respects is affirmed.

HOMESTEAD CONTEST—RESIDENCE—ADVERSE CLAIM.

RENSHAW *v.* HOLCOMB.

The allowance of six months from the date of homestead entry for the establishment of residence is a privilege authorized by regulation of the Department under section 2297 R. S., and protects the entry from the inference of abandonment during said period, but there is no authority for excusing default in the matter of residence after the expiration of said period, and in the presence of an adverse claim.

Secretary Bliss to the Commissioner of the General Land Office, July 1, 1898.

(W. V. D.) (C. J. W.)

On October 27, 1894, Henry S. Holcomb made homestead entry for the S. ½ of the SW. ¼, the SW. ¼ of the SE. ¼ and the NW. ¼ of the SW. ¼ of Sec. 12, T. 33 N., R. 23 E., Spokane Falls, Washington.

On September 4, 1895, Harvey H. Renshaw filed his affidavit of con-

test, alleging abandonment for more than six months and that Holcomb had never resided on the land.

A hearing was had, November 7, 1895, which resulted in a decision by the local officers in favor of contestant, and a recommendation that the entry be canceled and contestant allowed the preference right of entry.

The defendant appealed, and on October 14, 1896, your office reversed the decision of the local office and held the entry intact. The case is before the Department on the appeal of contestant.

The case is one where a year had elapsed between the date of the entry and the hearing, and where the entryman lived within a mile of the land entered, and yet failed to establish residence upon it.

Your office expresses the opinion:

> That Holcomb has manifested good faith in his attempt to complete the house and establish his residence on the land within a reasonable time, but that the conditions and circumstances unavoidably prevented him from doing so.

The case of Black *v.* Canon (3 L. D., 48,) is cited in support of this opinion. That case is not authority for excusing failure to establish residence within six months from entry, in the presence of an adverse claim, but only as between the government and the entryman, where he has acted in good faith and has cured his default before a hearing. Cannon made entry September 22, 1882, and returned to his home in Nebraska, intending to return to the land within six months from his entry. He was detained by the sickness of his mother and the severity of the weather, and was sixteen days making the return journey, and reached the land April 22, 1883, one month after the expiration of six months from entry, but before service of notice of the contest. He was working on the land when notice of the contest was posted on it, and residing on it at the date of trial, and returned to it before the first publication of the notice of contest.

The facts in the case at bar bear no resemblance to the facts in the case cited. Holcomb has never cured his default, and is asking that it be excused in the presence of an adverse claim, without being cured.

Residence and cultivation are requirements of the homestead law. The allowance of six months from the date of entry within which to establish or begin residence is a privilege authorized by regulation of the Department, based on section 2297 of the Revised Statutes, and protects the entry from the inference of abandonment for six months from entry. This was, in substance, held in the case of Nilson *v.* St. Paul, Minneapolis and Manitoba Railway Company (6 L. D., 567). That was another case where the question was between the government and the entryman alone. It is not authority for excusing default in the matter of residence, after six months from entry and in the presence of an adverse claim. The regulation of the Department requiring the establishment of residence within six months from the date of entry is a legal requirement and can not be relaxed. In cases where it appears that the entryman in good faith intended to establish residence

within six months, and was engaged in the act of carrying out such intention, but was prevented from getting on the land by intervening circumstances which he could not control, the effort may be accepted as compliance with the law.

It was more than three months after Holcomb's entry before he took any step towards the improvement of the claim, and it is apparent that it was fully in his power to have complied with the requirements of the law, in the matter of establishing residence, if he had earnestly endeavored to do so. Residence may be commenced in a very cheap structure, but there must be inhabitancy. The defendant seeks to excuse his default on the ground of the poor health of himself and wife, but the evidence shows that both worked and attended to ordinary duties, and that he was not so poor as to be entirely dependent on his own labor. He seems to have proceeded upon the idea that the law did not require him to neglect his regular pursuits and business to prepare for his removal, and that only his leisure need be devoted to these preparations, and that he could take whatever time he desired, so that he maintained possession of the premises and kept others off. That he may have been honestly mistaken as to the requirements of the law is probable. The facts remain that, after the lapse of more than twelve months from the date of his entry, he is found still residing upon railroad land, a mile from his claim, and cultivating it, while the only use to which he has put the entered land has been to mow hay upon it. From the evidence it appears that this is the purpose to which it is best suited. It does not appear that he has ever slept upon it, cooked a meal upon it, or cultivated an acre of it. It is not a case of jumping a claim upon the bare expiration of the time allowed for the establishment of residence, but the contest is filed nearly eleven months after entry. The proceeding is one which the law invites under such circumstances, and the contestant has fairly earned a preference right to make entry for the land.

Your office decision is reversed and the homestead entry of defendant canceled.

KUEPPER *v.* TRIPP.

Motion for rehearing denied by Secretary Bliss July 5, 1898. See departmental decision of April 23, 1898, 26 L. D., 561.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT CLAIM.

KAUFFMAN *v.* NORTHERN PACIFIC R. R. CO.

Where a railroad company designates as the basis for an indemnity selection land indicated by the records of the Land Department as within an Indian reservation, and it is subsequently ascertained that such tract is not within said reservation, the company is entitled, as against intervening adverse claims, to a reasonable time within which to assign a new basis for said selection.

A homestead settler who makes entry of a part of the land embraced in his settlement claim thereby abandons said claim as to the remainder; and the land thus released from said claim is thereafter open to indemnity selection.

Secretary Bliss to the Commissioner of the General Land Office, July 5, 1898.
(W. V. D.) (C. W. P.)

Jacob D. Kauffman has appealed from the decision of your office of September 29, 1896, rejecting his application to make homestead entry of the SE. ¼ of Sec. 29, T. 15 N., R. 43 E., Walla Walla land district, Washington, for conflict with the indemnity selection of the Northern Pacific Railroad Company.

This land is within the indemnity limits of the grant to said company, and was selected by the company December 17, 1883 (list No. 2), as amended October 26, 1887, by the designation of losses in bulk, and as further amended September 2, 1892, by a rearranged list, specifying the selections and losses, tract for tract.

The records show that on February 16, 1895, Jacob D. Kauffman presented his application to homestead this land, alleging settlement and occupancy by his father, Jacob Kauffman, in the fall of 1878, and that upon the protest filed by the company against the acceptance of the same, a hearing was duly held. The local officers decided in favor of Kauffman and recommended that the company's selection be canceled and Kauffman allowed to make homestead entry of the land. The company appealed to your office.

There appears to be no dispute about the facts, which are stated in your office decision as follows:

In the fall of 1878, Jacob Kauffman (the father of Jacob D. Kauffman) made settlement on the S. ½ of the SE. ¼ of Sec. 29, part of the land in dispute, in connection with the N. ½ of the NE. ¼ of Sec. 32, T. 15 N., R. 43 E. In 1879 he built a house on the N. ½ of the NE. ¼ of Sec. 32, and established his residence therein. From that time up to June 12, 1882, when, it seems, he made homestead entry No. 2548 (F. C. 112), for the N. ½ of the NE. ¼, Sec. 32, he continued to cultivate the S. ½ of the SE. ¼, Sec. 29, and claim both tracts as a homestead.

Your office held that upon making said entry Kauffman exhausted his homestead privilege and virtually abandoned his settlement on the S. ½ of the SE. ¼, Sec. 29, so that he had no claim as a homestead settler to assert to said tract at the date (December 17, 1883,) of the company's selection thereof, when, it is also in evidence, he was still cultivating the said tract in connection with his homestead land (the N. ½ of the NE. ¼, Sec. 32), and had filed with the company a settler's application for the purchase of the same.

This application was perfected into a contract in 1884. In 1893, he gave possession of the tract to his son, Jacob D. Kauffman, who has since occupied and improved it.

From the foregoing, your office held that at the date of the company's selection of December 17, 1883, no valid settlement right had attached to the S. ½ of the land in dispute, sufficient to bar a selection

thereof by the company: that as to the N. ½ of said land (the SE. ¼ of Sec. 29), it is admitted in the testimony on behalf of plaintiff that the same was free and unappropriated at said date.

Your office further held that the selection of record at the date of Kauffman's homestead application was not invalid because the land in Sec. 29, T. 7 N., R. 15 E., designated as basis for the selection in the company's amended lists of 1887 and 1892, was on survey subsequently made found to be outside the Yakima Indian reservation, for the reason that, it appearing that when the amended lists of 1887 and 1892 were filed, the official records indicated that the land in Sec. 29, T. 7 N., R. 15 E. (then unsurveyed) designated as basis for the selection, was within the Yakima Indian reservation, but on survey subsequently made was found to be outside said reservation, and that the company has, on notice of the defect in said basis, on January 25, 1896, and within a reasonable time substituted a new and adequate basis for the selection, such substitution, under the rule laid down in the Lake Superior terminal case (21 L. D., 412), the company had the right to make, as against intervening adverse claims.

It appearing from the record that the tracts (then unsurveyed) designated as basis for the selection in the company's amended lists of 1887 and 1892, were at the time supposed to be part of the Yakima Indian reservation, as shown by the records of your office, but on survey subsequently made were found to be outside the reservation, and as

indemnity selections are made under the direction of the Secretary of the Interior and the enforcement of any requirement in the matter of specification of loss is only for his information and as a bar to the enlargement of the grant and may be waived whenever he deems such a course advisable. (William Hickey, 26 L. D., 621,)

it seems to be equitable that the company should be allowed to assign a new basis as against Kauffman's application to enter the land. Gamble *v.* Northern Pacific Railroad Company, 23 L. D., 351; Page *v.* Id., 24 L. D., 444.

Your holding that the land was free from adverse claim at the date of the company's selection, December 17, 1883, is concurred in. Holm *v.* St. Paul, Minneapolis and Manitoba Railway Company, 16 L. D., 251.

For these reasons, your office decision is affirmed.

APPLICATION TO ENTER—INTERVENING CLAIM.

SARTIN *v.* GLENN.

A second application to enter, made under an erroneous direction of the General Land Office, will not be considered, on the intervention of an adverse claimant, as a waiver of rights secured under the first, that in fact was legal in all respects, and entitled to recognition at the date of action thereon by the General Land Office.

Secretary Bliss to the Commissioner of the General Land Office, July 5, 1898.

(W. V. D.) (L. L. B.)

Your office decision of December 4, 1895, adhered to on review, May 15, 1896, allowing the application of John Glenn to make homestead

entry for the NW. ¼, Sec. 11, T. 23 N., R. 5 E., Perry, Oklahoma, is here on the appeal of Aaron Sartin therefrom.

The facts necessary in considering this appeal are these:

May 31, 1894, John Glenn applied to make homestead entry for this land, stating in his application that he had theretofore made soldiers' declaratory statement for a different tract. For that reason his application was denied.

He duly appealed, and accompanied his appeal by his corroborated affidavit, to the effect that when he went to settle upon the tract covered by his declaratory statement he found it occupied by an adverse settler who prevented the affiant from making settlement by force and intimidation; that he was advised by his lawyer not to contest the occupant, for the reason that the adverse settler could prove his settlement to be prior to the soldiers' declaratory statement of affiant; that for this reason he abandoned his claim to said tract and had never received any consideration for such abandonment.

By the letter of your predecessor of November 5, 1894, it appears that the fact that his application was for a specific tract was overlooked, and the local officers were directed—

to advise Mr. Glenn that his application being in effect an application for a second entry, can only be considered when he files a formal application for the specific tract of land he now desires to enter, and that his said application should be accompanied, if possible, by an affidavit, etc.

Attempting to comply with this direction, Glenn, on June 15, 1895, made a second application for the tract in controversy, referring in said application to his corroborated affidavit filed with his application of May 31, 1894.

August 17, 1895, two weeks subsequent to Glenn's second application, Aaron Sartin applied to make entry of the tract. His application was suspended to await the action of your office on the application of Glenn. Thereupon Sartin protested against the allowance of Glenn's entry and filed his affidavit, stating:

That on the 31st day of May, 1895, affiant moved his family on said tract of land, where this affiant and his family have resided continuously to the present time, and that prior to the filing of said application 88, by John Glenn, this affiant was residing on said tract with his family and claiming the same as his homestead, and had thereon a well started, breaking done, and other acts of settlement and improvements.

It is not known what the figures "88" in this application have reference to, as neither of the Glenn applications are numbered, but it is evident that the application referred to by the affiant is the one made by Glenn on June 15, 1895, in compliance with your office letter of November 5, 1894.

This was the status of the parties when your office decision was rendered from which this appeal is prosecuted by Sartin.

It is insisted by Sartin, that by the filing of his second application, June 15, 1895, Glenn must be regarded as having abandoned his appli-

cation of May 31, 1894, and inasmuch as Sartin alleges settlement on the land prior to Glenn's last application, a hearing should be ordered to determine the priority of the parties; that Glenn lost his rights under his first application by failure to appeal from your office decision of November 5, 1894.

This contention can not be allowed. The decision of your office of November 5, 1894, can not be regarded as a rejection of his first application. It is rather in the nature of a suspension of consideration until certain requirements therein specified were complied with by Glenn, the language there used being that "his application . . . . . can only be considered when he files a formal application for the specific tract he now desires to enter," etc., when in fact all the requirements therein specified had already been complied with by Glenn, which fact, as admitted in your office decision on review, May 15, 1896, had been overlooked in said decision of November 5, 1894.

It is clearly shown that at the date of your office decision, November 5, 1894, Glenn had complied with all the requirements of the law and was a qualified entryman, and it was error not to have then directed the allowance of his application, which was made a year prior to the date of Sartin's alleged settlement on the land.

The second application by Glenn, having been made by direction of your office, can not be considered as waiving any rights he acquired by his first application, which was legally and properly presented.

The claim of Sartin having been initiated pending consideration by the Department of the rights of Glenn accruing prior thereto, was properly suspended during such consideration, and Glenn having shown his qualifications to enter the land in dispute, his entry was properly allowed.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—POSSESSORY CLAIM.

HASTINGS AND DAKOTA RY. CO. *v.* GRINDEN.

A possessory claim to land, and cultivation thereof, unaccompanied by actual residence thereon, will not defeat the right of the company to make indemnity selection thereof.

Secretary Bliss to the Commissioner of the General Land Office, July 5,
(W. V. D.) *1898.* (F. W. C.)

The Hastings and Dakota Railway Company has appealed from your office decision of April 8, 1896, holding for cancellation its indemnity selection covering the E. ½ of the NE. ¼, Sec. 17, T. 119 N., R. 40 W., Marshall land district, Minnesota, with a view to the allowance of the homestead application of Carrie C. Grinden.

This tract is within the indemnity limits of the grant to said company

and was included in its list of selections filed October 29, 1891. It had been previously applied for on account of said grant on May 26, 1883, and was included in the selection of October 16, 1883, made by the St. Paul, Minneapolis and Manitoba Railway Company.

The claimed rights under the selection of October 16, 1883, by the Manitoba company, and the application of the Hastings and Dakota company of May 26, 1883, were disposed of in departmental decision of October 23, 1891 (13 L. D., 440), and the land was held subject to entry by the first legal applicant or to selection by the company first presenting an application therefor in due form.

The present case arose upon the tender of homestead application by Carrie C. Grinden on May 11, 1894; in support of which she alleged, in her affidavit accompanying her application—

> that she purchased the improvements for a valuable consideration, that had been made on the land, in October, 1889, taking immediate possession of same at that date. The improvements were commenced in 1886 and continuously cultivated and improved ever since; that her improvements consisted of a dwelling house and forty-three acres under cultivation, and that the value of the same is $150; that she established her actual residence on the land in June (1), 1892, which has been continuous up to the present time; that she was in possession of the land on October 29, 1891; and asks that her entry be allowed; otherwise, that a hearing be had that she may be allowed to substantiate the allegations herein set forth by competent witnesses that she may protect her rights and claim to said land.

Against the allowance of said application a protest was filed on behalf of the Hastings and Dakota Railway Company, which was considered in your office decision of April 8, 1896, in which it was held (*inter alia*):

> That inasmuch as Grinden's allegation of settlement, improvement, and cultivation prior to the date of the Hastings and Dakota Company's selection, of the tract in controversy, was not denied, and as she has since established her residence upon the land and continued such cultivation and improvement, the company's selection should be canceled to the extent of the tract in controversy, with a view of allowing Grinden's application to enter the same.

From said decision an appeal has been filed on behalf of the Hastings and Dakota Railway Company, in which it is alleged, in substance, that your office erred in holding that the mere occupation of the land in controversy by Grinden at the date of the company's selection, without residence or an application to enter, was sufficient to defeat such selection.

The question raised by the appeal is, Had the present homestead applicant such a claim to the land on October 29, 1891, the date of the company's selection, as would bar the allowance of said selection?

From the showing made in support of her application it appears that she purchased the improvements upon this land in October, 1889, and that she thereafter cultivated the breaking upon the tract, but did not take up a residence on the land until June 1, 1892, more than two and a half years from the time she took possession of the tract.

While under departmental decisions settlement can be effected with-

out actual residence, the settlement must be followed, within a reasonable time, by actual residence, in order to claim any rights thereunder; but here Grinden does not allege or claim a settlement prior to the company's selection, and two years elapsed from the date when she took possession before the company made selection of the land. During this period she had not taken up a residence upon the land, and it would seem that if she initiated any right by her purchase of the improvements and by her possession and cultivation of this tract, it was waived and lost by her failure to take up a residence upon the tract for the period of two years preceding the company's selection.

It is therefore held that she had no such claim to this tract as would bar its selection on account of the grant; and her application will stand rejected and the company's selection, if otherwise regular and proper, will be submitted for approval.

Your office decision is accordingly reversed.

ADDITIONAL HOMESTEAD ENTRY—SECTION 6, ACT OF MARCH 2, 1889.

TRUJILLO *v.* ARCHULETTA.

A homesteader who, prior to the act of March 2, 1889, through ignorance and mistake transmutes a pre-emption filing for eighty acres to a homestead entry and perfects the same, and then makes homestead entry for one hundred and sixty acres, not knowing that he had prior thereto exhausted his homestead right, may be permitted, under the subsequent provisions of said act, to relinquish eighty acres of the land covered by said entry, and take the remainder under section 6 of said act.

Secretary Bliss to the Commissioner of the General Land Office, July 5, (W. V. D.) *1898.* (G. R. O.)

The case of Jesus Trujillo *v.* Rafael Archuletta has been considered on the record thereof forwarded here in pursuance of the order of this Department dated October 3, 1896, directing such action.

It appears from the record that Archuletta, on April 9, 1880, filed pre-emption declaratory statement for eighty acres of land in the Pueblo, Colorado, land district. On July 7, 1880, he transmuted this filing into a homestead entry and made final proof thereon on December 10, 1880. On May 3, 1888, he made another homestead entry for the SW. ¼ of SW. ¼, Sec. 22, the SE. ¼ of the SE. ¼ of Sec. 21, the NE. ¼ of the NE. ¼ of Sec. 28, and the NW. ¼ of the NW. ¼ of Sec. 27, T. 26 S., R. 71 W., Pueblo, Colorado.

On June 15, 1892, Jesus Trujillo filed affidavit of contest against said entry, alleging failure to reside upon and cultivate the land as required by law. Hearing on this affidavit was set for August 8, 1892, and on that day both parties appeared and submitted testimony. On August 12, 1892, while the hearing was still in progress, Trujillo filed another affidavit of contest against the same entry, alleging that the said entry

was illegal from its inception, inasmuch as Archuletta had already made an entry under the homestead laws. Archuletta then filed a relinquishment of the SE. ¼ of SE. ¼ of Sec. 21, and the NE. ¼ of NE. ¼ of Sec. 28, and followed this with an affidavit in which he asked to be allowed to enter the remaining eighty acres as an additional homestead under Sec. 6 of the act of March 2, 1889 (25 Stats., 854).

This second affidavit of contest was filed by the local officers to await the determination of the case then pending. On October 8, 1892, they rendered a decision in the first contest, stating:

> We are of the opinion that the good faith on the part of the claimant is manifest, and recommend that his homestead entry, to the extent of eighty acres not relinquished, be allowed to remain of record, subject to future compliance with the homestead laws.

On appeal by contestant the action of the register and receiver was approved by your office. In your decision the only question passed upon was that of the residence, etc., of the entryman. His relinquishment was referred to and the remaining portion of his entry was allowed to remain intact. The Department, considering the case on appeal from the decision of your office, said:

> I concur in the finding of facts and the conclusions of law contained in the concurring decisions of the local office and your office, holding the entry of Archuletta, as respects the SW. ¼ of SW. ¼, Sec. 22, and NW. ¼ of NW. ¼, Sec. 27, Tp. 26 S., R. 71 W. (not relinquished) intact, and therefore affirm the same.

The first contest having been disposed of, notice of a hearing on the second contest was given to all parties, and on May 2, 1895, the hearing was had.

The local officers in deciding the case, held that the entryman having made a homestead entry for eighty acres, he could not make another for one hundred and sixty acres, and as he had taken no steps toward curing the illegality of his entry until after the initiation of this contest, they recommended that his entry be canceled. On appeal your office affirmed this decision.

At the hearing held May 2, 1895, counsel for the contestant made an ineffectual attempt to induce Archuletta's attorney to admit that his client was the same person who had made homestead entry No. 1597 on July 7, 1880. Failing in this he testified himself to the effect that the affidavit of contest was filed on August 12, 1892, at ten o'clock a. m., in the presence of the contestee's attorney, who examined it at the time.

He also offered in evidence papers and records of your office which showed that Rafael Archuletta had made homestead entry for eighty acres in 1880, and that Rafael A. Archuletta had made homestead entry in 1898 for the land in contest, embracing one hundred and sixty acres. He also offered the relinquishment of Archuletta for eighty acres of the last-mentioned homestead entry and Archuletta's affidavit, in which he asks to be allowed to hold the unrelinquished portion of said entry under Sec. 6 of the act of March 2, 1889.

This last mentioned affidavit contains all the facts necessary for a determination of the questions involved in this contest, and it is introduced as part of the contestant's testimony. He can not, therefore, deny the statements made in it.

Said affidavit shows that Archuletta is an illiterate Mexican who is unable to read or write the English language; that after a residence of about twelve years upon the land embraced in the homestead entry made in 1880, he had made a pre-emption filing for the same; that he had employed an attorney to assist him in making final proof on this filing and this attorney had caused him to sign certain papers which he supposed were the affidavits, etc., required for such final proof; that in reality the effect of these papers was to change his pre emption filing into a homestead entry; that in May, 1888, he made homestead entry of the land now in contest, not knowing that he had already exhausted his homestead right; that as soon as he discovered the mistake into which he had been led when he made his first entry, he sought to correct it by relinquishing eighty acres of the second homestead entry, and he now asks permission to enter the remaining eighty acres under section six of the act of March 2, 1889.

This is the proof submitted by the contestant, and it is the opinion of the Department that, under the circumstances, Archuletta should be permitted to retain the land. His good faith in the premises can not be disputed. He has resided upon the land with his family since 1885, has made valuable improvements upon it, and has complied, in every respect, with the requirements of the homestead law. He made his first homestead entry of eighty acres in the belief that he was making use of his pre-emption right, and he had no intention of exercising his homestead right at that time. The condition of affairs is due, not to any act or intention on his part, but to a mistake for which he is in no way responsible.

Since March 2, 1889, Archuletta has had the right to enter an additional eighty acres under the homestead law. His homestead entry of one hundred and sixty acres was, therefore, invalid only to the extent of the excess over eighty acres, and as soon as this excess was relinquished all objection to the entry on the ground of excessive area was removed. Trujillo had a preference right to make entry of the eighty acres relinquished, but instead of taking advantage of this privilege he allowed his brother to enter the land and continued his fight against this poor old Mexican.

The Department will use every effort consistent with a proper administration of the public land laws to protect the rights of *bona fide* settlers in their honest endeavors to secure homes upon the public domain. The equities of this case are all with Archuletta, and you will permit him to enter the land as an additional homestead under section six of the act of March 2, 1889.

Your decision is reversed.

PRACTICE—NOTICE OF APPEAL FROM LOCAL OFFICE.

McFADDEN ET AL. *v.* COLVILLE RESERVATION MINING CO.

In the case of appeals from the local office the Rules of Practice make no specific provision as to the manner in which notice of appeal shall be served, or how proof of such service shall be made; and, in the absence of such provision, notice given in the manner required by the local courts will be held good.

Secretary Bliss to the Commissioner of the General Land Office, July 5, 1898.

(W. V. D.) (E. B., Jr.)

On February 11, 1897, the Colville Reservation Mining Company filed its application for patent to the Extension to the Contention lode survey No. 353, A, and to the Extension Mill Site Survey No. 353, B, Spokane, Washington, land district. On April 19th following, during the period of publication of notice, W. D. McFadden and others, as owners of the Kruger lode claim, offered for filing certain papers as an adverse claim against the said application. These papers the local office rejected, April 20, 1897, on the ground that they were "insufficient under the Mining Rules of the Department to constitute an adverse claim." April 21, 1897, McFadden *et al.* filed an appeal from the action of the land office.

The record having been forwarded to your office the appeal was returned to the local office on August 28, 1897, for "proper service" of notice upon the said company, because the evidence of notice then in the case was not that "required by Rule 96 of practice." Referring to the requirement of August 28, 1897, your office on October 4, 1897, further addressed the local office as follows:

> September 27, 1897, the resident attorneys for the contestants filed in this office the following affidavit in the effort to show due service of notice:
>
> William T. Stoll, being first duly sworn, deposes and says that he mailed at the Spokane City post office, on April , 1897, a letter addressed to H. R. Clise, as Secretary of the Colville Reservation Mining Company, Seattle, Washington, containing a copy of the appeal filed by the appellants with the register and receiver of the U. S. Land Office at Spokane, Washington, in the case of W. D. McFadden, *et al.*, *v.* The Colville Reservation Mining Company.
>
> Affiant further says that since that time said Clise has admitted to affiant that said copy of appeal was received by him.
>
> This evidence of service is not satisfactory.
>
> If, as required by rule 96 of practice, a copy of the appeal was sent by registered mail, the files of the post office would show such fact and proof thereof could be obtained.
>
> If notice was not sent by registered mail, the service made was not sufficient to bring the contestee into court in the absence of its voluntary appearance of which there is no record.
>
> The contestant will, therefore, be allowed thirty days from notice hereof within which to furnish the required proof, in the absence of which the appeal from your decision will be dismissed.

On January 8, 1898, it appearing that due notice of your office letters of August 28, and October 4, 1897, had been given all parties, and that

the required proof of notice had not been furnished, the said appeal was accordingly dismissed. From this action McFadden *et al.* prosecute an appeal to the Department, contending that their appeal from the action of the land office "was properly and seasonably served as matter of *fact*," and that "notice and copy of such appeal was properly and sufficiently given as matter of *law*."

The question thus presented is whether proof of service of notice of appeal from the action of the local office is governed by Rule 96 of Practice. Rule 96 reads:

> Proof of service by registered letter shall be the affidavit of the person mailing the letter, attached to a copy of the post-office receipt.

Such proof of notice has not been furnished in this case. Separate and distinct rules are provided in the Rules of Practice for appeals from the action or decision of the local office to the Commissioner, and for appeals from the Commissioner to the Secretary. Rules 43 to 48, inclusive, pertain to appeals from the local office; Rules 81 to 103, inclusive, to appeals from the Commissioner. Among the rules relating to the former appeals is Rule 46, which is the only rule upon the subject of notice of appeal from the action or decision of the local office. It reads:

> Notice of appeal and copy of specification of errors shall be served on appellee within the time allowed for appeal, and appellee shall be allowed ten days for reply before transmittal of the record to the General Land Office.

It thus appears that no specific rule as to how service shall be made or as to what shall constitute proof of service of notice of appeal from the local office is provided in the Rules of Practice.

Rule 46 as set out above has only been in effect since September 1, 1885. Prior to that date, on which the rules of practice approved August 15, 1885 (4 L. D., 35) went into effect, no notice of appeal from the action or decision of the local office was required. In Lynch *v.* Merrifield, decided November 17, 1882 (1 L. D. 472) it was held (syllabus):

> The rules for appeal from the local offices and from the General Land Office are separate and distinct, and there is no rule or provision for applying the one to the other.
>
> These rules do not require that notice of appeal from the decision of the local officers shall be served upon the opposing party.

Rule 96 was the same then as now. In Lynch *v.* Merrifield, *supra*, Mr. Secretary Teller discusses at some length the difference in the practice then prevailing upon the subject of notice of appeal from the local office and from your office, and states substantial reasons therefor. See also Bennett *v.* Furman (2 L. D., 612, where Lynch *v.* Merrifield was cited and followed. In the rules approved August 15, 1885, in harmony with the now practice then declared in Rule 46, Rule 70 was changed so as to include Rule 93 as one of the rules "applicable to all appeals from decisions of register and receiver," thus clearly indicating

a purpose not to extend the application of the other rules relating to appeals from your office to the Department, to appeals from the local office to your office.

The affidavit of William T. Stoll, the body of which is set out in your office letter of October 4, 1897, does not appear to have been transmitted here with the papers in the case, but from said letter and from other affidavits of said Stoll of like import (except as to the receipt of the notice) it sufficiently appears that the notice was sent in due time by ordinary mail to one H. R. Clise as Secretary of the company at Seattle, said State. It appears that the principal office of the company is at Seattle, and that said Clise is the company's secretary. Although the company has been duly advised of all the action heretofore taken by the local office and your office it has made no denial of the due service of notice. It seems that the service of notice was made after the manner of service required in the Superior Court of Spokane county said State. In the absence of any special rule of the land department requiring service to be made otherwise, such service is held to be sufficient.

The decision of your office is reversed accordingly.

ABANDONED MILITARY RESERVATION—PREFERENCE RIGHT OF ENTRY.

DIAZ *v.* GLOVER.

The preference right to make entry of land within an abandoned military reservation accorded actual settlers by the acts of August 23, 1894, and February 15, 1895, must be asserted within the statutory period; and if the settler's application to enter is rejected on account of an adverse claim he must appeal from such action, or institute contest against such claim within said period.

On the rejection of an application to enter for the reason that part of the land is covered by the prior entry of another, and failure of the applicant to appeal therefrom, his subsequent contest against the prior entryman will not operate to reserve for his benefit the land not in conflict.

Secretary Bliss to the Commissioner of the General Land Office, July 5, 1898.

(W. V. D.) (F. C. D.)

The land involved herein is the NW. ¼ of the SW. ¼ of Sec. 25, T. 13 S., R. 14 E., Tucson, Arizona, land district, and is a part of the Fort Lowell military reservation, being thrown open to settlement under act of Congress approved August 23, 1894 (28 Stat., 491), entitled "An Act to provide for the opening of certain abandoned military reservations, and for other purposes."

On June 6, 1895, James Benton Glover made homestead entry for the SW. ¼ of said section 25, alleging settlement and residence thereon since January 23, 1895. On June 7, 1895, Bernadino Diaz made homestead application to enter the NW. ¼ of said SW. ¼, together with the

NE. ¼ of the SE. ¼ of section 26, same township and range, alleging that—

I claimed and settled upon the land about the first day of February, 1894, and have continuously claimed and cultivated the land until the present date, and have resided on the land with my family since January 29, 1895.

Said application was rejected "because tract partially covered by H. E. No. 2401," being the said homestead entry of Glover.

From said rejection Diaz did not appeal, but, on November 16, 1895, he filed an affidavit of contest against the said entry of Glover, alleging a prior and superior right to the said land in conflict. A hearing was had, and thereafter the local office decided in favor of Diaz, finding—

that the contestant Bernadino Diaz improved the land in controversy and established his home thereon prior to and before the time that the contestee James B. Glover improved the said land or established himself on the land, and, under the provisions of said act of Congress (Aug. 23, 1894), was entitled to a preference right to file his homestead application for said tract of land.

On appeal, your office found that Diaz settled and established his residence on said land prior to Glover, and held—

that Diaz applied in time to enter the land after he established his residence thereon, to protect his right thereto, but that by his failure to prosecute his claim before November 16, 1895, by either appealing from the rejection of his application within thirty days, or by filing his contest before the expiration of six months from Feb. 15, 1895, he forfeited his right to the NW. ¼ SW. ¼, Sec. 25, to defendant, Glover, who made entry of the land.

Upon examination of the testimony the facts appear to be substantially as set forth in the decision appealed from, and it appears therefrom that Diaz was entitled to the benefits of said acts and had the prior and superior right to enter said land.

The said act of August 23, 1894, above cited, was amended by the act approved February 15, 1895 (28 Stat., 664), extending the preference right of entry to actual settlers for six months from the date of the said amendatory act (Circular, 20 L. D., 569).

Diaz's application was filed within six months from the date of said act of February 15, 1895, and Diaz alleged therein settlement on the land prior to the entry of Glover; therefore the local officers should not have rejected his said application, but should have ordered a hearing to determine the rights of the parties. See case of John W. Austian (18 L. D., 23), and cases therein cited.

Diaz should have appealed from the said rejection of his application, and by failing to so appeal he lost whatever rights he acquired under said acts, above mentioned, by virtue of his settlement upon said land. (Wickstrom *v.* Calkins *et al.*, 20 L. D., 459.

This contest did not reserve the tract embraced in Diaz's said application to enter not in conflict herein, for the benefit of Diaz, he having, as above stated, failed to appeal from said rejection. Will *v.* Williamson (21 L. D., 208).

It appears from the record herein that one William Haynes was, on January 16, 1896, allowed to enter the E. ½ of the SE. ¼ of Sec. 26, T. 13 S., R. 14 E., which embraces the land applied for by Diaz and not in dispute herein.

The decision of your office dismissing Diaz's contest is, for the reasons herein stated, affirmed, and the contest dismissed.

THRAILKILL *v.* LONG.

Motion for review of departmental decision of May 10, 1898, 26 L. D., 639, denied by Secretary Bliss, July 5, 1898.

HOMESTEAD SETTLERS—MILITARY SERVICE.

CIRCULAR.

Commissioner Hermann to registers and receivers, July 8, 1898.

Your attention is called to the attached copy of the act approved June 16, 1898 (Public No. 140), entitled "An Act For the protection of homestead settlers who enter the military or naval service of the United States in time of war."

You will observe that the act provides that hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits, that the settler's alleged absence from the land was not due to his employment in the military or naval service of the United States in time of war, and all affidavits of contest hereafter filed in which abandonment is alleged must conform to the requirements of this act.

The other provisions of the law are so plain, no additional instructions are deemed necessary.

Approved.

C. N. BLISS,
Secretary.

[PUBLIC—NO. 140.]

AN ACT For the protection of homestead settlers who enter the military or naval service of the United States in time of war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the existing war with Spain, or during any other war in which the United States may be engaged, his services therein shall, in the administration of

the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits of contest, and proved at the hearing in cases hereafter initiated, that the settler's alleged absence from the land was not due to his employment in such service: *Provided*, That if such settler shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence without reference to the time of actual service: *Provided further*, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

Approved, June 16, 1898.

REPAYMENT—DOUBLE MINIMUM EXCESS.

INEZ RHODES.

There is no authority for the repayment of double minimum excess erroneously charged for land reduced in price by section 3, act of June 15, 1880.

Secretary Bliss to the Commissioner of the General Land Office, July 6, 1898.

(W. V. D.) (J. L. McC.)

Inez Rhodes has appealed from the decision of your office, dated November 24, 1896, denying her application for repayment of the excess above single minimum paid by her for the N. ½ of the NE. ¼, the SE. ¼ of the NE. ¼, and the NE. ¼ of the SE. ¼, of Sec. 26, T. 49 N., R. 6 W., Ashland land district, Wisconsin.

The ground of your decision is that the land described is within the primary limits of the grant to the Chicago, St. Paul, Minneapolis & Omaha Railway Company (Bayfield branch), and that double minimum price was therefore properly charged.

The grant to said Omaha road was made by act of June 3, 1856 (11 Stat., 20). By the second section of said act, the price of all sections and parts of all sections of land within the primary limits reserved to the United States, was raised to double-minimum. The road has been constructed to Bayfield, as provided for by the first section of said act; and no part of the grant to said Bayfield line has been forfeited.

Counsel for the applicant quotes the third section of the act of Congress approved June 15, 1880 (21 Stat., 237), which reads as follows:

> That the price of lands now subject to entry, which were raised to two dollars and fifty cents per acre and put in the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre.

Counsel for the applicant contends that "the land entered by Inez Rhodes, *nee* Dexter, falls literally within the terms of the statute just quoted," inasmuch as the land was offered at double-minimum prior to

January, 1861, and as Mrs. Rhodes made entry of the same May 6, 1893, (since the passage of said act of June 15, 1880).

If it be true, as alleged by counsel for the applicant, that the land in question was offered at double-minimum prior to January, 1861, it would clearly appear that the price paid by her should have been single-minimum. But however that may be, "there is no authority for the repayment of double-minimum excess erroneously charged for land reduced in price by Sec. 3, act of June 15, 1880," (William Edmonston, 20 L. D., 216; see also case of Joseph Brown, 5 L. D., 316, where the subject of repayment generally is exhaustively considered.)

The judgment of your office, in so far as it holds that there is no authority for repayment of the excess above single-minimum paid in the case at bar, is therefore affirmed.

HOMESTEAD CONTEST—ABANDONMENT—MORTGAGE.

KEZAR *v.* HORDE.

A charge of abandonment is not supported by showing that the entryman had executed a deed to the land prior to final proof, where it appears that said instrument was intended to serve the purpose of a mortgage to secure the payment of money advanced to the entryman for his personal use, and the improvement of his claim.

Secretary Bliss to the Commissioner of the General Land Office, July 8, 1898.

(W. V. D.) (P. J. C.)

March 2, 1892, Henry Horde made homestead entry for the S. ½ of the NW. ¼ of Sec. 20, T. 35 N., R. 26 W., Marquette, Michigan, land district. June 3, 1895, Walter P. Kezar filed an affidavit of contest against the same, alleging that the entryman had abandoned the same and changed his residence therefrom, and that the tract was not settled upon as required by law.

As a result of the hearing the local officers found in favor of the entryman. On appeal, your office reversed their finding and held the entry for cancellation; whereupon the entryman prosecutes this appeal.

The Department is unable to agree with the decision of your office in this case. The charge of abandonment by the entryman is defeated by the testimony beyond any doubt. Horde bought the improvements of a former settler on the land, which consisted of a house and about seven acres partially cleared. Prior to hearing he had fifty-five acres, in cultivation, thirty-five of which were entirely denuded of timber, stumps and stone and in a high state of culture. He had straightened a small stream that runs through it and walled the banks with rock. It was fenced on three sides. The work had extended over the period of the life of the entry, and, according to the estimates of the defendant and his witnesses, was done at an expense of about six thousand dollars. It is conceded that his land is the best cleared and prepared

of any in that region, and every year he has raised good crops thereon. Just prior to the service of notice of this contest he had a large amount of building material delivered on this particular tract for the erection of a more commodious residence and large barns. In view of all this, it would seem to be idle to contend that there was a physical abandonment of the land, or any intention of so doing by the entryman.

The charge that he had never settled or resided upon the land, is not satisfactorily sustained by the evidence. It appears that prior to the entry Horde owned and lived upon eighty acres of land in section 19, cornering on that in controversy. At that time he was a widower with three children, two of whom were away at school. When he made the entry in question, he moved some of his furniture into the house and established his residence therein. He slept there most of the time when he was on the farm, and continued to do so after his second marriage, his wife accompanying him. It is true, perhaps, that he took his meals the greater portion of the time at the "stone house," as it is designated, on the land in section 19, but that he did occupy the other and slept there, that he was on the land and constantly working and improving it, is satisfactorily shown.

The testimony of the contestant is of little value and entirely of a negative nature. He lives in a town a few miles distant, where he is engaged in mercantile business, and, occasionally, about twice a month, as he says, would drive past the house. He did not see Horde occupying the house on these occasions. His witnesses, while they live in the immediate vicinity, give evidence of the same general character. They did not see Horde living on the land, but admit that he might have been there nights and they not see him.

There was offered in evidence a certified copy of deed from Horde to Felicita Martz, dated October 31, 1893, conveying the land in dispute, and others. This is a deed of general warranty, with this exception:

> This deed is given with the express condition that if the said second party shall die before the demise of the first party, then all the property mentioned and described in the within deed shall revert to the said first party.

It appears that on the same day this deed was executed the parties thereto intermarried.

It is shown by the testimony of Horde that this deed was given as a guaranty or mortgage for money his wife was to advance to him to pay off his debts and to improve the land; that she had some land of her own in Tennessee which she would sell and the money should be applied for his use. It appears that she gave him one thousand dollars, of which he "paid $450.00 and $100 taxes," $150 to "Kezar for store goods to work the homestead," and the balance he spent on the land.

Under the decisions of the supreme court of Michigan, where this land is situated, a deed absolute on its face may be shown by parol to be a mortgage. (Emerson *v.* Atwater, 7 Mich., 12; McMillan *v.* Bissell, 63 Id., 69.)

In Mudgett *v.* Dubuque, etc. (8. L. D., 243) it is decided (syllabus):

A homesteader whose good faith is apparent may mortgage his claim, before final certificate, to secure money with which to improve his land, or for any other purpose not in itself tending to impeach his *bona fides*.

Following the doctrine of these cases, it is clear that this deed is no evidence of abandonment on the part of the entryman.

Your office judgment is therefore reversed and that of the local office affirmed.

INDIAN ALLOTMENT—RELINQUISHMENT—APPLICATION.

WILLIAM C. SPALDING *v.* KINNEY ET AL. AND FRANK L. SPALDING *v.* KINNEY ET AL.

An order of the Department accepting the relinquishment of an Indian allotment takes effect as of the date thereof, and the land released thereby from appropriation becomes subject to entry as of such date, without regard to the time when such order is noted of record in the local office.

During the pendency of an appeal from the rejection of an application to enter an entry of the land by a subsequent applicant should not be allowed.

Secretary Bliss to the Commissioner of the General Land Office, July 8,
(W. V. D.) *1898.* (G. C. R.)

On March 1, 1892, there was allotted to Willie Knee, a Lower Brule Sioux Indian, a tract of land described as follows: The NW. ¼ of the SW. ¼ and the S. ½ of the NW. ¼ and lots 2, 3, 5, 6 and 7, Sec. 28, T. 103 N., R. 72 W., in the Chamberlain land district, South Dakota. The allotment covered 320.30 acres, and is No. 72 on the rolls of the Lower Brule Indian Agency.

On August 28, 1895, Knee, the allottee, represented to the Commissioner of Indian Affairs that he was "wholly dissatisfied" with his allotment; that it was inconvenient for him to receive his rations; that he was so far removed from the agency that he could obtain no work there, even when work could be obtained; that there were only a very few Indians in the section of country where his allotment was situated; that he was thus isolated from his people, and without that protection which he would have if on the reservation; that when away from home white people bother his cattle and other property, thus preventing him from having anything; for these reasons he asked to be allowed to relinquish "and do hereby relinquish all my rights, title and interest to said land to the United States;" that he received no consideration for said relinquishment. This relinquishment was duly signed and acknowledged before Sylvan Winter, U. S. Special Allotting Indian Agent, who on August 28, 1895, transmitted the same to the Commissioner of Indian Affairs, recommending its acceptance.

On August 29, 1895, or about the date of said relinquishment, the Indian allottee sold to William C. Spalding "one log house, fencing

and all improvements" upon the lands so allotted and signed a bill of sale, duly witnessed. These improvements were sold for $35, seven dollars of which were paid at the time of sale. The Indian, who can speak, read and write the English language, testified that he thought he had the right to sell the improvements without the Indian agent's consent.

On September 7, 1895, the Commissioner of Indian Affairs submitted to the Department all the facts connected with the relinquishment, together with his recommendation that the proposed relinquishment be accepted, and that the United States agent of the Lower Brule and Crow Creek agency be authorized to dispose of any improvements upon the lands covered by said allotment, for the benefit of the allottee, and that the Indian, Knee, be permitted to remove to the Lower Brule reservation and take lands there.

On September 9, 1895, the Department, in accordance with this recommendation, "accepted" the relinquishment and authorized the Indian agent of said agency to dispose of any improvements upon the lands for the Indian's benefit, it not appearing that the Indian had then sold his improvements; also granted permission to the Indian to remove to the Lower Brule reservation and take lands there, if so entitled.

On October 5, 1895, the Commissioner of Indian Affairs advised the Indian agent at Crow Creek, South Dakota, of the action taken by the Department, directing that the instructions be carried out, and that the Indian be advised "to remove to the Lower Brule reservation and make a selection of lands there for allotment."

On October 28, 1895, William C. Spalding applied to make homestead entry for the NW. ¼ of the SW. ¼ and lots 5, 6 and 7 of said Sec. 28, and on the same day Frank L. Spalding applied to make homestead entry for the S. ½ of the NW. ¼ and lots 2 and 3 of said Sec. 28. These applications embraced the lands covered by the Indian's allotment, and were on their presentation rejected, because "in conflict with Indian allotment No. 72 of Willie Knee, made March 1, 1892."

The applicants filed their separate appeals, alleging the regularity of their applications, and that the land sought to be entered by them was at date of their applications open to settlement and entry

for the former Indian allottee, Willie Knee, had at that time duly relinquished said land to the United States, and his relinquishment had been approved and allowed by the Honorable Commissioner of Indian Affairs.

Fred Treon, as Indian agent of said agency, on June 10, 1896, transmitted to the Indian office a copy of an agreement entered into January 8, 1896, between Willie Knée and John Albers, by the terms of which Knee sold the improvements on the allotment to Albers for the sum of $25, Albers further agreeing that if he receives the filings on the allotment to pay to said Knee "one span of gray Norman horses and light wagon." The Indian agent in transmitting this agreement advised the

Indian office that he had received from Albers the price of the improvements ($25), and had paid the same to Knee.

On January 16, 1896, the Commissioner of Indian Affairs advised your office of all the proceedings relating to the Indian's relinquishment, to the end that proper notations be made upon the records of your office showing that the lands formerly covered by the Indian allotment were released therefrom.

Notation having been made upon the records of the local land office showing the Indian's relinquishment, James W. Sanford, on January 29, 1896, made homestead entry for the SE. ¼ of the NW. ¼ and lots 2, 3 and 5 of said Sec. 28, and on the same day Clyde E. Kinney made homestead entry for the SW. ¼ of the NW. ¼, the NW. ¼ of the SW. ¼ and lots 6 and 7 of said Sec. 28. Sanford's entry was thus in conflict with William C. Spalding's application as to said lot 5 and with Frank L. Spalding's application as to the SE. ¼ of the NW. ¼ and lots 2 and 3. Kinney's entry was in conflict with William C. Spalding's application as to the NW. ¼ of the SW. ¼ of Sec. 28 and said lots 6 and 7, and with Frank L. Spalding's application as to the SW. ¼ of the NW. ¼ of said Sec. 28.

On February 3, 1896, John Albers, the purchaser of the Indian's improvements, sold the same to Clyde E. Kinney, one of the entrymen.

On February 3, 1896, Frank L. and William C. Spalding united in a written protest against the allowance of the entries of Kinney and Sanford, giving substantially the history of the case, their own applications for the land, reciting their respective appeals; also that they had before said entries were allowed commenced to improve the lands for which their respective applications had been made. They asked that a hearing be had to show their prior and better rights, etc.

On February 25, 1896, your office ordered a hearing, which was duly had. The register and receiver recommended that the protests be dismissed and the entries held intact. On appeal, your office, by decision dated August 20, 1896, reversed that action, and directed that the entries be canceled, "without further notice to the entrymen," and that the two Spaldings be allowed to make entry of the lands for which they had respectively applied. Upon a motion for review of that decision, your office, on October 31, 1896, entertained the same, and held the entries of Kinney and Sanford intact. From that judgment Frank L. and William C. Spalding have filed an appeal.

While the testimony of the two protestants was separately taken at the hearing, the register and receiver formulated their findings, and decided both cases together, for the reason that the facts in the two cases are similar and the same questions of law are involved. Your office followed that plan, and one appeal brings both cases to this Department.

The hearing was addressed mainly to the question of the kind of improvements which were placed on the lands by the two Spaldings. It appears that D. W. Spalding, father of the two applicants, obtained

permission of the Indian in 1895 to enclose part of the land with a fence, which, with surrounding rivers and streams, made an enclosure which the Indian and Spalding used as a pasture; this fence Spalding gave to his son, one of the applicants; the improvements on the land purchased from the Indian by D. W. Spalding were in August, 1895, also given to William C. Spalding. Both applicants in that month cut and laid four logs in the shape of a foundation for a house, on their respective claims; they also hauled some logs and placed them on their respective claims, and each put up a notice on his claim. It appears that these improvements were observed by the entrymen, who prior to their respective entries had notice of the claims of the two Spaldings.

At date of the two entries (January 29, 1896,) made by Sanford and Kinney no one had established residence on the land, and it was for this reason that the register and receiver decided in favor of the entrymen.

It is clear that so long as the Indian allotment of the lands existed, it was not subject to entry. But at the time (October 28, 1895,) Frank L. and William C. Spalding applied to make their respective entries upon the lands, the Indian's relinquishment had been (September 9, 1895,) accepted by this Department, and the Indian agent had (October 5, 1895) been so advised by the Commissioner of Indian Affairs. It is true, that when the Spaldings applied, the local officers had not then been officially advised of the action of the Department accepting the Indian's relinquishment, and hence their records did not show what was then really true, namely, that the land was free of the allotment, and therefore subject to entry. The act of the Department in accepting Knee's relinquishment was to all intents and purposes a judgment directing the cancellation of the allotment, and the order accepting the relinquishment granted the Indian the privilege of taking other lands.

A judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date, without regard to the time when such judgment is noted of record in the local office. John W. Korba, 24 L. D., 408; McDonald *et al. v.* Hartman *et al.*, 19 L. D., 547; Pomeroy *v.* Wright, 2 L. D., 164; Perrott *v.* Connick, 13 L. D., 598.

Since the records at the local office did not show the relinquishment of the Indian allotment at the time the Spaldings applied, the action by that office was upon an incomplete record.

The appeals from that action were, however, promptly filed, alleging as grounds of error the existing fact, viz: that when the applications were presented, the allottees relinquishment had been made and accepted by this Department, the land thereby being subject to entry.

The appeals from the rejection of the applications having been taken, it was improper to allow the entries of Kinney and Sanford for the same land until those appeals had been acted upon. The appeals of

the two Spaldings show that their grounds of error were well taken, for, as before shown, the lands were then subject to entry.

The order of the Department accepting the Indian's relinquishment also directed the disposal of the Indian's improvements on the land. The Department then had no information that the Indian had already disposed of the improvements, but that feature of the proceedings was not made a condition to the acceptance of the relinquishment, and has little, if any, bearing upon the merits of the case.

The decision appealed from is reversed, the entries of Kinney and Sanford will be canceled, and Frank L. and William C. Spalding will be allowed to enter the lands, as per their respective applications.

SETTLEMENT BEFORE SURVEY—SECTION 2274 R. S.

McKINNON *v.* ANDERSON.

Where two settlers prior to survey agree as to the line separating their claims, on the belief that such line would coincide with the official survey, and it is subsequently found that their improvements are on the same sub-division, their rights should be adjusted, so far as in conflict, in accordance with the agreed line, by allowing the entry of one for the tract in question, on condition that he makes title to the other for such portion of said tract as would fall to him under the original agreement.

Secretary Bliss to the Commissioner of the General Land Office, July 8, 1898.

(W. V. D.) (E. F. B.)

This controversy involves the right to the SE. ¼ of the NE. ¼, Sec. 7, T. 29 N., R. 11 W., Seattle, Washington.

On June 17, 1895, Olaf Anderson made homestead entry of said tract, with the S. ½ of the NW. ¼ and the NE. ¼ of the NW. ¼, Sec. 8.

September 3, 1895, John McKinnon filed his application to make homestead entry of the SE. ¼ of the NE. ¼, the E. ½ of the SE. ¼ of said section 7, and the NW. ¼ of the SW. ¼ of said section 8, which conflicted with the entry of Anderson as to the SE. ¼ of the NE. ¼, Sec. 7.

Upon the filing of an affidavit alleging prior settlement upon the tract in conflict, a hearing was ordered to determine the respective rights of the parties.

The local officers recommended that the SE. ¼ of the NE. ¼ of Sec. 7, and the SW. ¼ of the NW. ¼ of section 8, should be divided according to the line originally agreed upon. Upon the appeal of Anderson, your office reversed said decision and dismissed the contest of McKinnon; from which decision he has appealed.

The testimony shows that these claimants went upon the tracts embraced in their respective claims prior to survey, having employed a surveyor to locate them, so that their claims would conform to the government surveys when made. The line run by the locator as the dividing line between the two claims was supposed to be where the east and west line through the center of sections 7 and 8 would be

located by government surveys, it being the intention of the locator and both claimants that Anderson's claim should be north of said line and McKinnon's claim south of it.

The locator then drew a diagram of each claim, on separate pieces of board, and placed them on a tree on the line—Anderson's on the north side and McKinnon's on the south side.

Considering that the line dividing the two claims would be, when surveyed, the east and west line through the center of sections 7 and 8, the claim of McKinnon, as indicated by the diagram, would have been designated as the E. ½ of the SW. ¼, section 7, the NW. ¼ of the SW. ¼, section 8, and the NE. ¼ of the NE. ¼, section 18, while Anderson's claim would be designated by the subdivision covered by his entry, and it was supposed by all parties that their claims would be covered by such legal subdivisions.

Acting upon the advice given by the surveyor and locator, it being mutually understood between both parties that the line as run would vary but little, if any, from the government survey, they both placed their improvements upon the SW. ¼ of the NW. ¼ of section 8, Anderson building his house about twenty rods north of the line, and McKinnon placing his about twenty rods south of the line.

There is some testimony as to whether McKinnon's house was not placed nearer to the line than Anderson's, but it is immaterial. It is sufficient that both believed the line would vary but little from the government survey and that their houses and improvements were made on the north and south side of the line, under the belief that the land built upon was embraced in the subdivision intended to be entered when surveyed, by each party respectively, and that ample margin was given for any variation that might be shown by survey.

After the survey it was found that the east and west line through the center of sections 7 and 8 ran thirty-five rods south of the line fixed by the locator as the supposed east and west line through the center of said sections, which placed the improvements of each on the same legal subdivision.

If the government line had conformed to the supposed line upon which these settlers acted when they located their claims, there would have been no conflict between them, and the question arises whether their rights should now be adjusted according to this line, or whether they should be adjusted by awarding to each party the technical subdivision by which they supposed their claims would be designated.

The act of March 3, 1873 (R. S., 2274), was intended to provide a means by which the rights of settlers, initiated prior to survey upon the same subdivision, could be adjusted according to the lines of their respective claims by allowing the technical subdivision to be entered by one of said settlers upon the condition that he convey to the other the portion covered by his occupation and improvements.

This law can with stronger equities be invoked in this case, where the boundary between the respective claims was established with a full

understanding that the claims should be adjusted according to it and with the belief that the government survey would so nearly conform to it as to come within the margin fixed by each between the improvements and said line as agreed upon.

It is true that there was an understanding between these settlers that if the government line should not correspond with the line as fixed by the locator, each one would adjust his claim and improvements accordingly, but this agreement was made upon the supposition that the variation would be but slight, and did not contemplate that the discrepancy would be nearly one half of the legal subdivision.

After McKinnon ascertained that their claims would be in conflict as to the SE. ¼ of the NE. ¼, section 7, and the SW. ¼ of the NW. ¼ of section 8, by reason of the erroneous location of the line, he moved to and occupied the NW. ¼ of the SW. ¼, section 8, because his entry would be diminished by the conflict and he evidently wanted to secure sufficient land to make his full entry. This action on his part did not in any manner affect his right to that portion of the tract from which he had removed, nor indicate that he intended to surrender any rights thereto by reason of his prior settlement. Anderson did not act upon it, nor was any one misled by it. It was simply taken in order to supply the loss to his claim by reason of the conflict.

The rights of these parties should be adjusted so as to give to each one that portion of the land originally occupied by him, but as McKinnon has made no application for any portion of the SW. ¼ of the NW. ¼ of section 8, their joint entry should be confined to the legal subdivision in controversy. To this end, Anderson will be allowed to perfect his entry for the tracts embraced therein, upon condition that he make title to McKinnon for the portion of the SE. ¼ of the NE. ¼, Sec. 7, south of the line agreed upon between the parties as the dividing line between the claims, when he shall have completed his entry of the tracts applied for.

Your decision is reversed.

HOMESTEAD APPLICATION—SECTION 2291 R. S.

JOHNSTON *v.* BANE.

Section 2291 R. S., as amended by the act of May 26, 1890, warrants the allowance of an application to enter, sent by mail, where it is made to appear that the homesteader, by reason of poverty, and distance from the local office, is unable to present his application in person.

The failure of an applicant for the right of entry to sign his application is not a fatal defect, where the accompanying affidavits are properly executed; and the local office in such a case should suspend action on the application, and allow the applicant a reasonable time within which to cure the defect.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 9, 1898.* (G. B. G.)

This case involves the SE. ¼ of Sec. 27, T. 27 N., R. 2 W., Perry land district, Oklahoma, and is before the Department on a motion for review

of departmental decision of November 23, 1897 (unreported), which motion was duly entertained, and has been refiled with evidence of service.

The material facts of the case are these:

The defendant, Walter E. Bane, made the race for this land on the day of the opening, September 16, 1893, and settled thereon shortly after one o'clock of that day, by setting his flag and digging a small hole. On September 18, he started a foundation for a house, by digging four holes, about two feet square and one foot deep, also a well about two feet across and one foot deep. On Tuesday morning after the opening, he started for the land office at Perry, in a wagon, which place he did not reach until Wednesday afternoon. He made out a number in the filing line. Then made inquiries as to when he could file, and was told that it would be a month. He stated on the witness stand, at the trial of this cause, that he had about twenty dollars in money; that he got a lawyer to make out some papers for him, and acting under his advice he went before a judge at Newkirk and swore to the papers, and that after paying that officer one dollar, and paying three dollars for repairing his wagon, he only had one dollar left, exclusive of land office fees, which fees he sent by registered mail, with his application, from Arkansas City to the land office at Perry.

This application was not signed. With the application was the usual homestead affidavit and a further affidavit, in substance, that the land applied for is situated in "K" county, Oklahoma, over fifty miles from the United States land office at Perry; that affiant had not sufficient means with which to defray his expenses to and from said land office, and could not appear in person at said land office for the purpose of making entry.

This application, with the accompanying affidavits and fees, was received by the local officers September 23, 1893, and was rejected by those officers "for insufficiency of special affidavit and failure to sign application." Bane was not notified of this action.

On November 16, 1893, the plaintiff, Albert A. Johnston, made application to enter the tract, which the local officers suspended to await action upon Bane's rejected application.

On November 17, 1893, Johnston filed a protest against allowing an entry on Bane's application, alleging that he, Johnston, settled on the land at about ten o'clock A. M., September 29, 1893, and that his settlement was made before Bane's application and before any settlement made by Bane or any other person.

On January 8, 1894, Bane signed his application.

January 9, 1894, the local officers "removed" the rejection, and on February 22, 1894, issued homestead entry receipt on said application.

The local officers afterwards ordered a hearing on Johnston's protest, which was had February 20, 1895, and as a result of this hearing found that Bane was the first to perform an initial act of settlement, but that he failed to follow up such act by permanent improvements and resi-

dence within a reasonable time; that Johnston made settlement as alleged by him and did follow up his initial act of settlement by improvements and residence within a reasonable time; that it was error to allow Bane to make entry for the land while Johnston's protest was pending, and that the protest having been filed during the time Bane's application remained rejected, was equivalent to the intervention of an adverse right. Thereupon, it was recommended that Bane's entry be canceled and Johnston allowed to make entry for the land. From this action Bane appealed to your office.

Your office, in considering the case, March 5, 1896, after noting that the testimony showed that Johnston made his settlement on the land after Bane's application was received at the local office, and that Bane established his residence on the land within six months after said application was so received, held that his special affidavit brought the case within section 2294 of the Revised Statutes, as amended May 26, 1890, allowing certain applications by mail, that the informality of having failed to sign the application was not fatal, and that the rejection of said application by the local officers was error. The decision of the local officers was therefore reversed and Bane's entry held intact.

On appeal to the Department your office decision was affirmed.

The record has again been carefully examined.

It is clear that Bane's settlement was accomplished and his application by mail received at the local office before Johnston went on the land. It is also shown that Bane established his residence within six months after sending his application by mail to the local office. It is insisted in the motion for review, however, in substance, that the facts stated in Bane's special affidavit are untrue; that even if true, the application by mail was unauthorized; that if true and sufficient in law to authorize the application, still the application itself was without efficacy until it had been signed by the applicant; that it was not so signed until long after Johnston's settlement had been made and protest executed, and that therefore the parties should be remanded to their settlement rights. In this view, it is argued, the record shows that Bane's settlement was not followed up by residence and cultivation within a reasonable time, and that Johnston is entitled to the land by reason of his settlement, residence and cultivation.

The record shows that the land in controversy is a day's travel from the Perry land office. This question was gone into extensively at the hearing, and a large preponderance of the testimony shows that the distance over the most available route now traveled is more than forty miles. It is certain, too, that it is fifty miles by the route traveled by Bane when he made his first trip to Perry.

There is nothing in the record to impeach the further statement in Bane's affidavit that he was practically penniless. It was shown that he was at that time the owner of eighty acres of land in Kansas, which rented at two hundred dollars a year, but it was also shown that the

land was heavily mortgaged, and that the whole of this rent money was by contract applied each year on the mortgage debt.

It is a matter both of record proof and common notoriety that the delays at the Perry land office after the opening were very trying to homeseekers. Provisions were scarce and dear, and it was practically impossible for a penniless man to wait for days and weeks for his turn to file.

Section 2294 of the Revised Statutes, as amended by the act of May 26, 1890 (26 Stat., 121), is, in part, as follows:

> In any case in which the applicant for the benefit of the homestead, pre-emption, timber culture, or desert land law is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, he or she may make the affidavit required by law before any commissioner of the United States circuit court or the clerk of a court of record for the county in which the land is situated, and transmit the same, with the fee and commissions, to the register and receiver.

It is believed that the case of Bane is within the spirit of this law. The two causes specifically mentioned in the act are "distance" and "bodily infirmity," but by the further language of the statute—"or other good cause"—the officers of the land department are clothed with a large discretion. If the distance of this land from the Perry office were not in itself sufficient to authorize a filing by mail, this, considered with the further showing of the poverty of the applicant and the conditions existing at said office, makes a strong showing, and one which should prevail. Bane was prevented by "good cause" "from personal attendance at the district land office," his affidavit was executed before the clerk of a court of record for the county in which the land lay, and his application should not have been rejected, unless fatally defective on account of his failure to sign it. The application was not bad for that reason. It shows on its face that it was Bane's application for the land in controversy. It was accompanied by two affidavits properly executed. Bane can neither read nor write. His failure to sign the application was an unimportant oversight, for which he will not be held to damaging responsibility. The local officers should have suspended action on the application, notified the applicant of the defect, and allowed him a reasonable time within which to cure it.

There is no difference between an application to enter land placed of record and one offered and erroneously rejected, so far as the rights of the applicant are concerned, and Johnston acquired no rights on the land as against Bane while his application was pending, and until finally and properly disposed of. If Bane had received notice of the action of the local officers a different question might be presented. But he received no such notice, and is not chargeable with laches in failing to appeal.

In this view it is not necessary to consider the conflicting claims of these parties under their settlement rights. Bane established his residence within the time required by law, and has since cultivated and improved the land in manifest good faith.

The motion for review is denied.

RAILROAD GRANT—RELINQUISHMENT BY THE STATE.

THEUSCH *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

An applicant for the right of entry for land embraced in the grant for the use of the St. Paul, Minneapolis and Manitoba Ry. Co. is not entitled to plead the benefit of the State act of March 1, 1877, if it appears that the land in question was not one of the tracts described in the deed of relinquishment executed under said act, and that the applicant was not a settler thereon at the date of said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 9, 1898.* (E. B., Jr.)

This is a contest between Anton Theusch and the St. Paul, Minneapolis and Manitoba Railway Company for title to the E. ½ of the SE. ¼ of section 29, T. 131 N., R. 39 W., St. Cloud, Minnesota, land district. The land described is within the place limits of the grant to the State of Minnesota by the act of March 3, 1857 (11 Stat., 195), as amended by the acts of March 3, 1865 (13 Stat., 526), and March 3, 1871 (16 Stat., 588). It is claimed by said company as successor to the St. Paul and Pacific Railroad Company, successor to the State, on account of the St. Vincent Extension of the latter road. The line of the road was definitely located December 19, 1871, and the land was listed by the Manitoba Company on October 28, 1879.

The land is also within the thirty mile indemnity limits of the grant of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company, and is embraced in the company's indemnity list No. 45, filed April 27, 1892, which list was rejected by your office, as to the tract in controversy, on October 10, 1896, after a hearing to which both said companies and Theusch were parties, as will more clearly appear hereinafter. No appeal having been taken therefrom, your office finally closed the case, as to the last named company, on December 24, 1896. The Northern Pacific company is therefore no longer claiming the land.

On June 14, 1894, Theusch applied to enter the land as a homestead, alleging that one August Moling had settled on the land in August, 1872, "in connection with the W. ½ SE. ¼ of said section," had commenced improving the land "in the spring of 1874," and claimed the same as part of his homestead until 1883, "when he sold his improvements and possessory right to said land to said Anton Theusch," and that since such sale he (Theusch) "has occupied, cultivated and improved the same each year to the present time": wherefore he asked a hearing.

A hearing, to which all the claimants named above were parties, was held on January 25, 1895. On February 27, 1895, the local office rendered its decision adverse to Theusch, to the effect that there was no testimony showing or tending to show that Moling settled upon or improved the land in controversy prior to June 22, 1874, that he made homestead entry for the E. ½ of the SE. ¼, the SW. ¼ of the NE. ¼ and

the SE. ¼ of the NW. ¼ of said section, patent for which issued August 4, 1893, and that Theusch could not acquire any right to the land by virtue of Moling's settlement, and so rejected his application. Theusch appealed. Under the appeal, your office, on June 27, 1896, considered the claims of all parties, affirmed the rejection of Theusch's application, held that the land passed to the St. Paul, Minneapolis and Manitoba Company under its grant, and that the Northern Pacific company had no claim to the land, not having made selection thereof and it not being within any withdrawal for the benefit of that company on its general route. On review, at the motion of the last named company, your office, on October 10, 1896, modified its previous decision as to that company to the extent of finding that the land was embraced in the company's indemnity list No. 45, filed April 27, 1892, but held that the land passed to the St. Paul, Minneapolis and Manitoba company under its said grant, and so, as hereinbefore stated, rejected the former company's selection.

From the rejection of his application Theusch now prosecutes an appeal to the Department, his contention being that by virtue of the settlement of Moling and the provisions of section ten of an act of the legislature of Minnesota, passed March 1, 1877 (Special Laws Minnesota 1877, p. 257), the said tract was excepted from the grant under which the St. Paul, Minneapolis and Manitoba company claims.

By the terms of the grant to the State, repeated in each of the acts of 1857, 1865 and 1871, *supra*, the lands granted were to be subject to the disposal of the legislature of the State for the purposes of building the several lines of railroad indicated in the acts aforesaid. The company having failed to build the St. Vincent Extension and other extension lines within the time allowed therefor, the legislature of the State by the act of 1877, *supra*, provided for an extension of time for the building of these lines, imposing, however, certain conditions and limitations, among which are the following:

Sec. 10. The Saint Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim or demand in or to any piece or parcel of land lying or being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company, or their successors or assigns, upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid preemption or homestead filing or entries—not to exceed one hundred and sixty acres to any one actual settler; and the governor of this State shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the lands upon which they actually reside, from the United States, as homesteads or otherwise, and upon the acceptance of the provisions of this act by said company, it shall be deemed by the governor of this State as a relinquishment by said company of all such lands so occupied by such actual settlers; and in deeding to the United States such lands, the governor shall receive as *prima facie* evidence, of actual settlement on said lands, the

testimony and evidence or copies thereof heretofore or which may be hereafter taken in cases before the local United States land offices, and decided in favor of such settlers.

On June 23, 1880, the governor of Minnesota, in pursuance of the legislation above set out, and by virtue of the authority therein, executed a deed of relinquishment to the United States for certain tracts of land along the line of the St. Vincent Extension, "for the use and benefit of the persons" named therein. Said deed was filed here July 29, 1880. Attached thereto is the governor's certificate that—

the accompanying deed of relinquishment, executed by me in behalf of the State of Minnesota to the United States, embraces a description of all lands within the limits of the grant pertaining to the line of railroad known as the St. Vincent Extension of the St. Paul and Pacific Railroad, "upon which any person or persons have in good faith settled and made or acquired valuable improvements or upon which there had been filed any valid pre-emption or homestead filing or entry prior to March 1, 1877," together with the names of the settlers found to be legally and equitably entitled to the same respectively, in accordance with the provisions of an act of the Legislature of Minnesota, approved March 1, 1877, entitled: "An Act to provide for the completion of the lines of railroad commonly known as the St. Paul and Pacific Extension Lines."

The tract which Moling subsequently entered, and which has been patented to him, is among the tracts described in the deed of relinquishment, and he is named therein as the settler thereon, on March 1, 1877, for whose use and benefit the deed, as to that tract, was executed. The deed recites that the railroad company "accepted all the benefits, conditions and provisions of said act," and that the finding and determination therein as to the tracts and persons who had settled thereon was made "after a full hearing and examination of the evidence in the premises, as provided in section ten (10) of said act, and after hearing argument thereon by counsel for said railroad company." In St. Paul, Minneapolis and Manitoba Railway Company *v.* Moling (7 L. D., 184), which was a contest between the company and said Moling for the land relinquished by the State in his favor, the Department held (syllabus):

By the acceptance of the terms fixed by the State legislature, in extending the time for the completion of the road, the company relinquished all rights in lands to which it had not acquired full and legal title, and that were occupied by actual settlers prior to the passage of said act, and authorized the governor of the State to reconvey such lands to the United States.

See also the same doctrine in same *v.* Morrison, 4 L. D., 300, and same *v.* Chadwick, 6 L. D., 128.

The said legislation by the State, its acceptance by the company and the formal relinquishment by the governor of the lands described in his said deed, which were thus freed from the operation of the grant, did not in any way affect the status of the land Theusch claims. It was not so relinquished and freed thereby from the grant. It is not one of the tracts or parcels described in the deed. Theusch was not a settler thereon, nor on any of the lands described in the deed of relinquishment, on March 1, 1877.

It is not necessary to consider, or to comment upon, at any length, the testimony of Moling and one Knoerl, taken at the hearing, to support the allegation that Moling claimed the tract in controversy up to 1883 under his settlement and residence on the adjoining land. The determination by the governor, in 1880, of what land Moling claimed on March 1, 1877, by reason of his settlement, and Moling's acceptance of that determination, disprove such testimony. Be the facts upon that point as they may, however, they could not avail Theusch anything, since, as already stated, the land he claims was not relieved from the operation of the grant under the provisions of the State act.

It is not shown nor alleged that the land was settled upon, nor that any right adverse to the company had attached thereto at the date of the original grant, or the change of line by the act of 1871, or at the date of the definite location of the line in December, 1871. The right of the railroad company attached, therefore, at date of definite location and has since remained intact.

The decision of your office is affirmed accordingly.

SCHNEIDER *v.* LINKSWILLER ET AL.

Motions for review and rehearing denied by Acting Secretary Ryan, July 11, 1898. See departmental decision of March 18, 1898, 26 L. D., 407.

SETTLEMENT RIGHTS—NOTICE OF CLAIM.

ANNIS *v.* NAYLOR.

Notice of a claim is not the basis of title; and where settlement is relied upon as the basis, failure to maintain such settlement may be taken advantage of by a later settler although he may have notice of the prior claim.

Secretary Bliss to the Commissioner of the General Land Office, July 1, 1898.

(W.V.D.) (C.J.W.)

It appears from your office decision of February 25, 1896, in the case of John Annis *v.* Joseph C. Naylor, that "on October 5, 1893, one Marcus L. Carlisle, who had theretofore exhausted his homestead right, filed his application for restoration of right, and to make second homestead entry for lots 1 and 2 and S. ½ of NE. ¼, Sec. 3, T. 28 N., R. 2 E.," Perry land district, Oklahoma.

On October 26, 1893, Joseph C. Naylor applied to enter the land, and filed his protest against the allowance of Carlisle's application, alleging prior settlement.

November 27, 1893, John Annis filed his corroborated affidavit alleging settlement prior to both Carlisle and Naylor, and thereafter, on November 29, 1893, filed his homestead application for the land. On

May 25, 1895, Carlisle withdrew his application. On July 16, 1895, a hearing was had between Annis and Naylor, at which both parties appeared and submitted testimony.

On August 1, 1895, the local officers rendered a decision, in which they found, in substance, that Annis was the prior settler, and while ordinarily it would be held that he did not establish residence within a reasonable time, yet inasmuch as Naylor had knowledge of his prior settlement before he made any valuable improvements, and had said that if Annis was not disqualified by reason of having made the race from Chilocco reservation he would give him no trouble, Annis had the better claim. They therefore recommended the dismissal of Naylor's application, and that Annis be allowed to make entry.

Naylor appealed, and your office, in the decision of February 25, 1896, *supra*, reversed the local office and held that while Annis was the prior settler, he had failed to follow up his initial acts by the establishment of residence within a reasonable time and that Naylor's right was superior, and he would be permitted to perfect his application. Annis moved for review of said decision, and on September 16, 1896, your office adhered to the decision, and denied the motion.

From said decisions Annis has appealed to the Department.

From a careful examination of the decision rendered by the local officers, and those rendered by your office in the case, the conclusion is reached that there is practical concurrence of the two offices in the finding of facts, and only a difference as to the proper conclusions to be drawn from the facts.

The errors alleged to have been committed may, therefore, be properly classed as errors of law. There is but little, if any, controversy between counsel for the parties as to the material facts, but they differ as to the meaning and significance of the facts testified to and the inferences which may be legally drawn therefrom.

It is conceded that Annis staked the land and laid claim to it on the day of the opening, September 16, 1893. Naylor commenced his settlement on September 20, 1893, by setting upon the land a stake and flag, with his name written thereon. On September 22d he commenced a well near the southeast corner, which he never completed, for the reason that when he returned to it he found it had been plowed around. On the 25th or 26th he commenced to make improvements near the northeast corner, and slept on the land October 1st. In that month he erected a small sod house, now used for a hen house, and in the latter part of October he began the house which he afterwards occupied as a dwelling, and moved, with his family, into it on the 16th day of November, 1893, a few days after its completion. When he staked the land he saw some stone on the northwest corner, and near there a stake with a white rag attached. He learned Annis was the claimant the last of September or first of October. He also admits that there was some plowing on the land about the 25th of September. In October he saw

Annis turning up sod with a spade, every few steps, along the line from the northeast to the southeast corner. Up to about October 20th Naylor's improvements consisted of his stake, a well started, a few furrows plowed, and some breaking in order to get sod for his sod house. He had at date of the hearing a dwelling house, twenty acres in cultivation, ten or eleven acres in pasture, eighty-four fruit trees, two hundred and fifty grape vines, a cave, a chicken house, and a well—estimated to be worth about two hundred dollars.

John Annis, after staking the land on September 16, 1893, and digging a three cornered trench, remained upon it during the evening and stayed on it the night of the 17th with one of his boys; was on the claim the following Sunday; on Monday following he sent his two sons to the land with a load of stones, which were laid in a square form for a foundation, upon which his house was afterwards built; broke a small piece of land on the 23d of September, and some more on the 25th, and planted some peach seeds, hickory nuts and acorns on the 23d; on December 16th hauled a load of manure on the land and left it in a heap; also dug a hole that day; went again to the land on the first day of March, and began to build a house and moved into it on the 14th day of March, 1893, and has since resided on the land; has a dwelling house, hen house, stable, fifty-five acres in crop, nearly eighty acres fenced with two wires, and sixteen head of stock in pasture, also stock shed and pond in pasture.

The chief question which grows out of the facts stated is, whether or not plaintiff established residence within a reasonable time after staking the claim. If this question can be answered in the affirmative, his right is clearly superior to that of defendant, as he performed the first initial acts of settlement.

It is insisted by counsel for plaintiff that, inasmuch as he finally followed his initial acts of settlement by the establishment of residence, he must be presumed to have intended to make the land his residence from the time he performed the first act of settlement, and is to be regarded and treated as an inhabitant of the land from that date. That he did not in fact reside upon it until two days before the expiration of six months from the day on which he staked is admitted, and if it be held that his residence was established within a reasonable time, it would appear that six months was a reasonable time to allow a settler who has no entry of record to establish residence. Unless the circumstances of the case are such as to take it out of the ordinary rule, it can not be so held. It is to be borne in mind that neither party has an entry, and that each has upon him the burden of showing his right as a settler to make entry. Annis seeks to avoid the consequences of his delay in establishing residence, by showing ill health and poverty, as an excuse for the failure. He resided nine miles from the claim, draws a pension of thirty dollars per month, and had at date of hearing sixteen head of stock, but claims that his pension was largely devoted to

paying off a mortgage debt, and that he was unable to perform manual labor between the time he staked the land and the establishment of residence upon it, growing out of the fact that he was suffering from an ulcerated or sore leg.

Both your office and the local office agree that the plea of poverty and sickness is not sustained in such way as to make it available as an excuse, and this conclusion is evidently supported by the record.

The other and remaining ground upon which plaintiff claims his right to be superior to that of defendant is, that defendant had actual notice of plaintiff's claim and is estopped by his admission from setting up anything against plaintiff's claim, except his disqualification by reason of his having started from the Chilocco reservation. This seems to be the ground upon which the decision of the local office rests. It is therefore necessary to consider both the effect of the notice to defendant of plaintiff's prior settlement and the effect of his admission that plaintiff was prior to him in performing initial acts of settlement.

The requirement that the settler shall make improvements and establish residence on the land, it is insisted, is only for the purpose of making public the existence of his claim, and that actual notice of the claim to a later settler, as in this instance, accomplishes the purpose of the law. This contention is not believed to be sound, since the settler must make improvements and establish residence in a reasonable time, or the land must be treated as public land and subject to other disposition. Notice of a claim is not the basis of title, and where settlement is relied upon as the basis, failure to maintain it may be taken advantage of by a later settler, although he may have notice of the prior claim.

The defendant established residence within a little less than two months from the date of his settlement, and your office held this to be a reasonable time, under the facts disclosed by the record, and that conclusion is in accordance with the former rulings of the Department in similar cases. Your office also concluded that the plaintiff failed to establish residence within a reasonable time, and this conclusion seems to be supported by the record.

The only question, then, would seem to be whether there was any agreement or admission upon the part of Naylor which induced the plaintiff to delay the establishment of residence on the land, which would operate as an estoppel upon Naylor and prevent him from taking advantage of plaintiff's laches.

On pages 17 and 18 of the testimony, Annis testifies that on September 25th Naylor and Mr. Arnett came to his

house in Arkansas City, and wanted to know if he could put some improvements on there (meaning the land in dispute), so if the Chilocco run did not hold good, he would be the next man, and if the Chilocco run was good, he would get off of there, and give me no more trouble.

Ques. What did you tell him at that time with reference to allowing him to put improvements on the place?

Ans. I forbid him or any one else to put improvements on my homestead.

Ques. When was the first time that you ever learned that Mr. Naylor was claiming the tract of land, or found any evidence of settlement thereon claimed by him.

Ans. I don't remember the date, but the conversation took place between me and Mr. Naylor, that was on the claim, and I asked him if he had not been down to Perry and filed, and he said he had, and I said what did you do that for, and he answered me, "I was afraid you would not file on it."

Ques. Did he at that time inform you that if the Chilocco runners could hold that he would not bother you?

Ans. Yes, sir.

Naylor admits that when he visited Annis, September 25, 1893, he told him that if he was the settler on the land and the Chilocco runners were held good, he would give him no trouble, but denies the later conversation testified to by Annis.

It does not appear that Naylor made the statement to delay the improvements of Annis, or to prevent him from establishing his residence upon the land. In explaining his delay in establishing residence, Annis nowhere states that he was induced to delay by reason of Naylor's statement, but seeks to excuse his delay on other grounds. It also appears that when Naylor sought the consent of plaintiff to his settlement, he did not obtain it, but was forbidden to settle. He stands on his rights as a settler. He had notice of plaintiff's initial acts. His admission had reference merely to the priority of those acts over his later ones. It would be illogical to conclude that he thereby estopped himself from taking advantage of a defect in the plaintiff's claim which did not then exist, but which arose afterwards. These adverse claimants were under equal legal obligations to make improvements and establish residence.

Your office decision is accordingly affirmed.

CIRCULAR RESPECTING THE LOCATION AND ASSIGNMENT OF SCRIP ISSUED UNDER DECREES OF THE UNITED STATES SUPREME COURT, PURSUANT TO THE ACTS OF JUNE 22, 1860, MARCH 2, 1867, AND JUNE 10, 1872; AND ALSO SCRIP ISSUED UNDER THE ACT OF JUNE 2, 1858.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 31, 1898.

REGISTERS AND RECEIVERS,
United States District Land Offices.

GENTLEMEN: The act of Congress approved June 22, 1860, entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes" (Statutes, vol. 12, page 85), provides, in its sixth section, "That whenever it shall appear that lands claimed, and the title to which may be confirmed under the provisions of this act, have been sold in whole or in part by the United States prior to such confirmation, or where the surveyor-general of the district shall ascertain that the same can not be surveyed

and located, the party in whose favor the title is confirmed shall have the right to enter, upon any of the public lands of the United States, a quantity of land equal in extent to that sold by the Government: *Provided*, That said entry be made only on lands subject to private entry at one dollar and twenty-five cents per acre, and as far as may be possible in legal divisions and subdivisions, according to the surveys made by the United States."

The provisions of said act were extended and supplemented by the acts of March 2, 1867, and June 10, 1872, and they have been further supplemented by the act of January 28, 1879, entitled "An act defining the manner in which certain land scrip may be assigned and located, or applied by actual settlers, and providing for the issue of patents in the name of the locator or his legal representatives," a copy of which is hereto attached.

In pursuance of the provisions of these acts, scrip has been issued by this office, the several certificates of which, representing various quantities of land, according to the circumstances of the respective cases, may be located in legal subdivisions on any public land in your district subject to sale at private entry at $1.25 per acre, any small excess in such subdivisions over the area called for in the scrip to be paid for in money; or they may, under the second section of the act of January 28, 1879, be received from actual settlers in payment of pre-emption claims or in commutation of homestead claims, even where the same embrace lands subject to entry at the double-minimum price of $2.50 per acre, in the same manner and to the same extent as is now authorized by law in the case of military bounty-land warrants. But the law authorizes no fees to be collected by the district land officers on account of locations made with this scrip.

When such scrip is presented in payment of a *pre-emption claim* composed of lands subject to entry at $2.50 *per acre*, the pre emptor, in addition to the scrip surrendered, will be required to pay in cash the difference between the value of said scrip at $1.25 per acre and that of the tract embraced in his claim; or to surrender *additional scrip*; thus 160 acres of double-minimum land may be paid for by the surrender of one piece of scrip for 160 acres, and the payment of $200, or by the surrender of *two* pieces of scrip for 160 acres each or one piece for 320 acres. If the value of the scrip should exceed that of the lands entered therewith, the pre emptor will receive no repayment thereof from the United States; but if the land, at its rated price, should exceed the scrip in value, such excess must be paid by the locator with cash. It will be required also, in the location of a tract subject to entry at a greater minimum than $1.25 per acre, that each piece of scrip shall be located upon a *specific subdivision thereof*, and that the excess in area of the land, if any, shall be paid for in cash. The same rules will govern in commutations of homestead claims.

You will in every case require the party desiring to locate to surrender

the scrip and make application according to attached form A; when, if no objection should appear, you will allow the location to be made, properly fill up the heading of the application by inserting the number of the certificate of location, the register and receiver's number, the date of the decree, and the claim for which the certificate of location was issued, for which blanks are left in the form.

You will then issue a certificate of entry in duplicate according to form B annexed, one of which you will deliver to the party to be held by him as his evidence of title until the patent shall be issued.

The locations allowed, you will enter the same on your records, and at the expiration of the month will send up an abstract of all locations allowed during the same (form C annexed). You will forward therewith the applications received and certificates of entry issued during the month, and also the scrip surrendered. Patents will be issued thereupon in regular course as provided for in the third section of the act of January 28, 1879.

By the first section of that act it is declared that this scrip is "assignable by deed or instrument of writing according to the form and pursuant to regulations prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owners of the scrip." With regard to such form and regulations, the following is prescribed:

Entries with this scrip must be made by the confirmee or confirmees named in the scrip, or his or their duly authorized attorney, in the name of such confirmee or confirmees, or by the assignee or assignees of such confirmee or confirmees, or his or their duly authorized attorney, in the name of such assignee or assignees.

Each assignment must be attested by one or more subscribing witnesses; the mark of a witness will not be respected. Parties in interest as assignees are not recognized as legal attesting witnesses to an assignment, neither can an officer take an acknowledgment of an assignment to himself.

The execution of assignments is required to be acknowledged by the assignor, in the presence of a register or receiver of a land office, a judge or clerk of a court of record when authorized to take acknowledgments, a notary public, justice of the peace, a commissioner of deeds resident in the State from which he derives his appointment, or a United States commissioner, who shall certify to the fact of the acknowledgment and to the identity of the assignor, and the official seal of said court, notary public, or commissioner shall be affixed to the certificate. When the acknowledgment is taken before a justice of the peace or other officer without an official seal (except a register or receiver of a land office), it must be accompanied by an additional certificate, under seal of the proper authority, establishing the official character of the person before whom the acknowledgment was made and the genuineness of his signature.

Powers of attorney must be acknowledged in like manner

Assignments executed by unmarried females must be accompanied by evidence that they have attained the age of twenty-one years, and when married women assign, their husbands must unite with them in making the transfer.

When assignments are executed by a commissioner or other designated person, alleged to be acting under a decree of court, there must be procured and filed in this office a duly certified copy of such decree, in which all the proceedings had in the case should be recited, and from which it must appear that due notice of the pending suit had been given, by publication or otherwise, to all the parties interested.

When the assignment of this scrip is executed in a foreign country, and the acknowledgment thereof taken by an officer authorized by the laws thereof to perform such duties, the attestation of the American consul in such country should be obtained as to the official character and genuineness of the signature of the person before whom the acknowledgment of the said assignment was made, or if the official character, etc., of such foreign magistrate is attested by a consular agent of such foreign government residing in this country, his official character must be certified by the diplomatic representative of such government in the United States.

When such assignments are executed in a foreign language, duly authenticated translations thereof must be furnished. Secretaries of legation and consular officers of the United States are authorized to take acknowledgments, but they must certify the same under their official seals.

When the persons named as confirmees are described in the scrip as being minors, their assignments thereof must be accompanied by satisfactory evidence that they had attained their majority at the date of the transfer.

When an assignment has been executed and witnessed, but not acknowledged, it may be proved in open court, but a certified transcript of the proceedings in the case must be filed in this office. When, however, such assignment has not been properly attested, it must be made anew.

For general forms of assignment and of powers of attorney and acknowledgment, see forms D, E, F, G, H, I, K, L, M, N, O, P. In cases where the assignments, powers, or acknowledgments are written or printed and signed on the back of the certificate, the words "the within certificate" may be used instead of the full description of such certificate provided for in these forms.

It will not be practicable in all cases to attach the assignment or power of attorney to each certificate of location, and it will not be required by this office.

When a single assignment or power of attorney covers a number of certificates, such assignment or power may be filed in this office, and will be referred to to perfect the assignment of any of the certificates

named therein, whenever they or either of them shall have been located and returned to this office for patenting. Such assignment or power thus filed will also be referred to by this office for the purpose of attaching to any certificate of location named therein a certificate (form Q) relative to the validity of the certificate of location and the assignments thereof.

Upon the application of any assignee of this scrip, accompanied by the scrip and papers in his possession relative to the assignment thereof, this office will examine said scrip and assignments and such assignments thereof as are found on the files of this office; and if the scrip be found free from objections, and the assignments sufficient in form, a certificate of approval of such scrip and the assignments thereof (form Q) will be attached by this office to the scrip thus submitted.

Each piece of scrip thus transmitted to this office must be accompanied by the sum of one dollar, the legal fee for a certificate of verification.

The fourth section of the act of January 28, 1879, declares that its provisions respecting the assignment and patenting of scrip and its application to pre-emption and homestead claims shall apply to the indemnity certificates of location provided for in the act of the second of June, 1858, entitled "An act to provide for the location of certain confirmed private land claims in the State of Missouri," and for other purposes. The general principles hereinbefore laid down in regard to scrip issued under the act of June 22, 1860, are applicable to the class of certificates issued under the act of June 2, 1858, and you will be governed thereby in dealing with any of the latter presented for location. The same forms may be used with such verbal alterations in them as may be necessary to adapt them to the case in hand. You will take care, however, in making returns for these two classes of locations, to keep them separate and distinct.

The act of Congress, approved December 13, 1894, entitled "An act to provide for the location and satisfaction of outstanding military bounty-land warrants and certificates of location under section three of the act approved June second, eighteen hundred and fifty-eight" (28 Stat., 594), authorizes the use of certificates of location issued under the third section of the act of June 2, 1858, as well as military bounty-land warrants, in payment for other classes of claims therein specified, viz:

In the payment, or part payment, for any lands entered under the desert-land law of March 3, 1877, and the amendments thereto; in payment, or part payment, for lands entered under the timber-culture law of March 3, 1873, and the amendments thereto; in payment, or part payment, for lands under the timber and stone law of June 3, 1878, and the amendments thereto, and in payment, or part payment, for lands sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

This act does not change existing law or regulations as to the location of such warrants or scrip upon lands subject to sale at private entry,

or in payment for pre-emption claims or commutation of homestead entries, but in such cases the instructions hereinbefore given will apply.

In reference to the four classes of entries specified in the act of December 13, 1894, you are advised that one or more warrants or certificates of location are receivable in payment, or part payment, for a tract of land entered under either of the laws designated, at the rate of $1.25 per acre upon the expressed value of the warrants or certificates of location. If the amount of money due on such entry exceeds the face value of the warrant or certificate of location at the rate of $1.25 per acre, the entryman must pay for the excess in cash, but if the face value of the warrant or certificate of location exceeds the amount due on such entry, the claimant must take the tract in full satisfaction of said warrant or certificate of location.

As a basis for patent you will issue the regular receipt and certificate in each class of entry, viz: in desert-land entries, Forms 4–143 and 4–200, and in the other classes designated, Forms 4–131 and 4–189, noting thereon the manner of payment.

In initiating an entry under the desert-land laws, payment may be made in money to the amount of twenty-five cents an acre, as required by previously existing law, or, if preferred, warrants or scrip may be tendered as payment, and if the face value of such warrant or scrip exceeds the amount of money due in initiating said entry, credit may be given for any balance to be applied to final payment when final proof has been made. In this event you will make such notes on your records as will indicate such credit, giving the number and acreage of the warrant or scrip used, and in issuing final papers refer thereon to such credit, collecting any balance due in cash, warrants, or scrip. A notation should also be made on your joint certificate (Form 4–199) as to such location and credit.

Where such warrants or scrip are tendered as payment by other than the party to whom issued, you will require evidence that the entryman is the heir or legatee of the party to whom issued, or see that said warrant or certificate of location has been duly assigned in accordance with instructions herein.

No fees are required to be paid where warrants or certificates of location are used under this act, the same being regarded as the equivalent for money to the extent of their value at the rate of $1.25 per acre, and the local officers will receive from the United States Treasury their commissions upon the surrender thereof as in the case of entries made with actual cash.

When located, each warrant or certificate of location must be relinquished by the legal owner thereof after the following form, viz:

I (or we) do hereby relinquish to the United States the within military bounty-land warrant or certificate of location in payment (or in part payment as the case may be) of the (here describe the tract), located in the name of ———, at the land office at ———, this —— day of ———, 189 .

Witnesses: C. D.

E. F. (Signed) A. B. [SEAL.]

In their monthly abstracts the register and receiver will designate the entries in which warrants or certificates of location are used in payment, and will show the balance, if any, paid in cash. The receiver in his monthly account current will debit the United States with the amount of such warrants or certificates of location, and in his quarterly accounts will specify each entry in which such warrants or certificates of location are used in payment, giving the number and acreage of the warrant or certificate and date of the act under which issued, and the amount for which they are received, and debit the United States with the same.

Such warrants or certificates of location received in payment for lands sold must be forwarded to this office with your monthly account current for the month in which they are received, and must be designated in the receiver's letter of transmittal by number and acreage of each warrant or certificate of location, date of the act under which issued, amount for which received, and the register's and receiver's number of the entry in each case.

It may also be added that, under said act, no warrant or certificate of location can be used in payment for any lands which have been purchased from any Indian tribe within ten years last past, neither can they be used in payment for lands ceded to the United States by any Indian tribe where such lands are to be disposed of for the benefit of such Indian tribe.

Very respectfully, BINGER HERMANN,
Commissioner.

Approved:
C. N. BLISS,
Secretary.

[PUBLIC—No. 20.]

AN ACT defining the manner in which certain land-scrip may be assigned and located, or applied by actual settlers, and providing for the issue of patents in the name of the locator or his legal representatives.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, in cases prosecuted under the acts of Congress of June twenty-second, eighteen hundred and sixty, March second, eighteen hundred and sixty-seven, and the first section of the act of June tenth, eighteen hundred and seventy-two, providing for the adjustment of private land-claims in the States of Florida, Louisiana, and Missouri, the validity of the claim has been or shall be hereafter recognized by the Supreme Court of the United States, and the court has decreed that the plaintiff or plaintiffs is or are entitled to enter a certain number of acres upon the public lands of the United States, subject to private entry at one dollar and twenty-five cents per acre, or to receive certificate of location for as much of the

land the title to which has been established as has been disposed of by the United States, certificate of location shall be issued by the Commissioner of the General Land Office, attested by the seal of said office, to be located as provided for in the sixth section of the aforesaid act of Congress of June twenty-second, eighteen hundred and sixty, or applied according to the provisions of the second section of this act; and said certificate of location or scrip shall be subdivided according to the request of the confirmee or confirmees, and, as nearly as practicable, in conformity with the legal divisions and subdivisions of the public lands of the United States, and shall be and are hereby declared to be assignable by deed or instrument of writing according to the form and pursuant to regulations prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owners of the scrip, including the right to locate the scrip in his own name.

SEC. 2. That such scrip shall be received from actual settlers only in payment of pre-emption claims or in commutation of homestead claims, in the same manner and to the same extent as is now authorized by law in the case of military bounty-land warrants.

SEC. 3. That the register of the proper land office, upon any such certificate being located, shall issue, in the name of the party making the location, a certificate of entry, upon which, if it shall appear to the satisfaction of the Commissioner of the General Land Office that such certificate has been fairly obtained, according to the true intent and meaning of this act, a patent shall issue, as in other cases, in the name of the locator or his legal representative.

SEC. 4. That the provisions of this act respecting the assignment and patenting of scrip and its application to pre-emption and homestead claims shall apply to the indemnity-certificates of location provided for by the act of the second of June, eighteen hundred and fifty-eight, entitled "An act to provide for the location of certain confirmed private land-claims in the State of Missouri, and for other purposes."

Approved, January 28, 1879.

[PUBLIC—NO. 2.]

AN ACT to provide for the location and satisfaction of outstanding military bounty-land warrants and certificates of location under section three of the act approved June second, eighteen hundred and fifty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the benefits now given thereto by law, all unsatisfied military bounty-land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered under the desert land

law of March third, eighteen hundred and eighty-seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber culture law of March third, eighteen hundred and seventy-three, entitled "An act to encourage the growth of timber on the Western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An act for the sale of timber lands in the States of California, Oregon, Nebraska, and Washington Territory," and the amendments thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

Approved, December 13, 1894.

(FORM A.)

Acts of June 22, 1860, March 2, 1867, and June 10, 1872.

REGISTER AND RECEIVER'S No. ——. SCRIP No. ——

Scrip issued by virtue of a decree rendered on the —— day of ———, by the Supreme Court of the United States, for the claim of ——— ——— or ——— legal representatives.

I, ——— ———, hereby apply to locate with the above-described certificate ——— quarter of section No. ——, in township No. ——, of range No. ——, containing ——— acres, in the district of lands, subject to sale at ———.

Witness my hand this —— day of ———, A. D. 18—.

Attest:

——— ———.

——— ———, *Register.*

——— ———, *Receiver.*

(FORM B.)

Acts of June 22, 1860, March 2, 1867, and June 10, 1872.

CERTIFICATE OF ENTRY.
REGISTER AND RECEIVER'S No. ——.

UNITED STATES DISTRICT LAND OFFICE
AT ———, ———, 18—.

We certify that certificate of location No. ——, for ——— acres, issued by virtue of a decree rendered on the —— day of ———, by the Supreme Court of the United States, has this day been located by ——— ——— on the ——— quarter of section No. ——, in township No. ——, of range No. ——, containing ——— acres.

——— ———, *Register.*

——— ———, *Receiver.*

(FORM C.)

Abstract of locations made with scrip in satisfaction of private-land claims, under act of June 22, 1860, at the land office at ———, in the month of ———, 18—.

Date of location.	Register and receiver's No.	Scrip No.	Tracts located.				Area.	By whom located.	Remarks.
			Part of section.	Section.	Township.	Range.	Acres.		

LAND OFFICE AT ———, ———, 18—.

——— ———, *Register.*

——— ———, *Receiver.*

(FORM D.)

For the assignment of scrip by confirmee or assignee.

For value received I, ——— ———, to whom certificate of location No. ——, issued by the General Land Office of the United States on the —— day of ———, A. D. 18—, pursuant to the act of Congress approved June 22, 1860, and supplemental legislation, and by virtue of a decree of confirmation by the Supreme Court of the United States rendered ———, in favor of ——— ———, was issued (or was assigned by ——— ———, as the case may be), do hereby sell and assign to A B, of ——— County, State of ———, and to his heirs and assigns forever, all my right, title, and interest in and to the said certificate of location, and authorize the said A B, his heirs and assigns, to locate the same, and receive from the United States such evidence of title for such location as is now or may hereafter be authorized by law.

A B. [SEAL.]

Attest:

C D.

E F.

(FORM E.)

Of acknowledgment where the vendor is known to the officer taking the same.

STATE OF ———, }
——— COUNTY, } *ss:*

On this —— day of ———, 18—, before me personally came A B, to me well known, and acknowledged the foregoing assignment to be his act and deed; and I certify that the said A B is the identical person to whom the above-described certificate of location issued (or was assigned by ———), and who executed the foregoing assignment thereof.

(*Officer's signature.*)

(FORM F.)

Of acknowledgment where the vendor is not known to the officer and his identity has to be proven.

STATE OF ———, }
——— COUNTY, } *ss:*

On this —— day of ———, 18—, before me personally came A B and E F, of the county of ———, in the State of ———, and the said E F, being well known to me as a credible and disinterested person, was duly sworn by me, and on his oath declared and said that he well knows the said A B, and that he is the same person to whom the above-described certificate of location issued (or was assigned by ——— ———), and who executed the foregoing assignment; and his testimony being satisfactory evidence to me of that fact, the said A B thereupon acknowledged the said assignment to be his act and deed.

(*Officer's signature.*)

(FORM G.)

For the assignment of a certificate by an administrator.

For value received I, A B, administrator of the estate of ——— ———, deceased, who died intestate, to whom certificate of location No. ——, issued by the General Land Office of the United States on the —— day of ———, A. D. 18—, pursuant to the act of Congress approved June 22, 1860, and supplemental legislation, and by virtue of a decree of confirmation by the Supreme Court of the United States rendered in favor of ——— ———, was issued (or assigned, as the case may be), do hereby sell and assign for the use of ——— ——— unto ——— ———, of ——— County, State of ———, and to his heirs and

assigns forever, the said certificate, and authorize the said ——— ———, his heirs and assigns, to locate the same and receive from the United States such evidence of title for such location as is now or may hereafter be authorized by law.

A B. [SEAL.]
Administrator.

Attest:
E F.
G H.

NOTE.—A certified copy of the letters of administration must accompany this assignment or be filed in this office as a separate document, or a certificate filed from the clerk of the proper court that said letters had been duly issued and were in force at the date of the assignment.

If the date of death is not stated in the letters of administration, or other evidence as above mentioned, the same must appear in the clerk's certificate appended thereto.

(FORM H.)

For the acknowledgment.

STATE OF ———, } *ss:*
——— COUNTY, }

On this —— day of ———, 18—, before me personally came ——— ———, to me well known, and acknowledged the foregoing assignment to be ——— act and deed, and in my presence subscribed ——— name thereto; and I certify that the said ——— ——— is administrator of the estate of ——— ———, deceased, to whom the above-described certificate No. —— was issued (or was assigned by ——— ———), and who executed the foregoing assignment thereof.

Witness my hand and official seal the day and year above written.

(*Officer's signature.*)

(FORM I.)

For assignment of certificate by executor.

For value received I, A B, executor of C D, who died testate, and to whom—(same as form G).

NOTE.—A certified copy of the will, and also of the letters testamentary or other proper evidence, under the seal of said court, showing that said executor was duly appointed and authorized to act as such at the date of said assignment, must accompany this assignment, or be filed in the General Land Office as a separate document.

If the date of death is not stated in the letters testamentary or other evidence, as above mentioned, it must appear in the certificate of the clerk appended thereto, as taken from the records of said court. The certificate of the acknowledgment may be the same as in form H, except that the word "executor" must be used instead of "administrator."

(FORM K.)

For the assignment and acknowledgment of scrip by heirs at law of deceased confirmee or assignee.

For value received we, A B and C D, the only heirs at law of G H, to whom—(same as form D).

(FORM L.)

For the acknowledgment.

STATE OF ——, }
——— COUNTY, } *ss:*

On this —— day of ———, 18—, before me personally came A B and C D, to me well known, and acknowledged the foregoing assignment to be their act and deed; and I certify that the said A B and C D are the identical persons named in the attached certificate as the only heirs at law of said deceased, and who executed the foregoing assignment thereof.

Witness my hand and official seal the day and year above written.

(*Officer's signature.*)

NOTE.—For the evidence of the death and heirship above mentioned it will be necessary to procure and attach, or file in the General Land Office, as a separate document, a certificate, under seal, from a court having probate jurisdiction, showing that it has been proven to the satisfaction of said court, in open court, that said confirmee (or assignee) G H is dead, the date of his death, whether he died testate or intestate, whether or not he left a widow, and who are his heirs and only heirs at law, with their respective ages. If any of such heirs are *feme coverts* their husbands must join in the assignment.

This rule will apply to all assignments made by married women.

(FORM M.)

For the assignment of a certificate by a guardian.

For value received I, A B, guardian of the person and estate of C D, a minor, confirmee (or a minor heir at law of ——— ———, as the case may be), to whom certificate of location No. ——, issued by the General Land Office of the United States on the —— day of ———, A. D. 18—, pursuant to the act of Congress approved June 22, 1860, and supplemental legislation, and by virtue of a decree of confirmation by the Supreme Court of the United States in favor of ——— ———, was issued, do hereby sell and assign, for the benefit of said minor unto E F of the county of ———, and State of ———, and to his heirs and assigns, the said certificate, and authorize the said E F, his heirs and

assigns, to locate the same, and receive from the United States such evidence of title for such location as may be authorized by law.

——— ———, [SEAL.]
Guardian.

Attest:
G H.
I J.

(FORM N.)

Form of acknowledgment for guardian.

STATE OF ———, }
——— COUNTY, } *ss:*

On this —— day of ———, 18—, before me personally came ——— ———, to me well known, and acknowledged the foregoing assignment to be his act and deed, and in my presence subscribed his name thereto; and I certify that the said ——— ——— is guardian of the person and estate of said minor, and who executed the foregoing assignment thereof.

Witness my hand and seal the day and year above written.

(*Officer's signature.*)

NOTE.—A certified copy of the letters of guardianship, or other legal evidence, under the seal of the proper probate court, showing that the guardian was duly appointed and authorized to act as such at the date of said assignment, must accompany the certificate thus assigned; or where this evidence applies to a number of certificates it may be filed in the General Land Office separately, in which case such evidence will be used to perfect the assignment of the various certificates as they are from time to time located and returned to this office.

(FORM O.)

Power of attorney to sell or locate scrip.

Know all men by these presents that I, ——— ———, of the county of ———, State of ———, do hereby constitute and appoint ——— ———, of the county of ———, State of ———, my true and lawful attorney, for me and in my name to assign, sell, and convey (or locate) certificate of location No. ——, issued to ——— ——— by the General Land Office of the United States on —— day of ———, A. D. 18—, pursuant to the provisions of the act of Congress approved June 22, 1860, and supplemental legislation, and by virtue of a decree of confirmation rendered by the Supreme Court of the United States ———, 18—, in favor of the said ——— ———.

Witness my hand and seal this —— day of ———, A. D. 18—.

——— ———. [SEAL.]

Signed in the presence of—
C D.
E F.

The form of acknowledgment for a power of attorney must not be the same as for a sale of this scrip.

NOTE.—It must appear by satisfactory evidence that title to the certificate named was vested in the party executing the power of attorney on the day when such power was executed. Conditions should be inserted in the above power, 1st, revoking all powers of attorney previously given for the sale of the certificate named; 2d, renouncing all right to appoint any other person attorney for the sale of said certificate.

This renunciation must be for a valuable consideration, which, in all cases, should be expressed in the power.

(FORM P.)

Of the certificate of the clerk of the court, judge, or other person who is authorized to certify, under seal, to the official character of the officer who takes acknowledgments of assignments.

STATE OF ———,)
——— COUNTY,) *ss:*

I, A B, clerk of the court ———, in the county and State aforesaid, hereby certify that John Jones, whose genuine signature is affixed to the above acknowledgment, was, at the time of signing the same, a justice of the peace (notary public, or other officer), duly authorized by law to take such acknowledgment, and that full faith and credit are due to all his official acts as such.

Given under my hand and the seal of said court this —— day of ———, 18—.

A B, *Clerk.* [SEAL.]

NOTE.—Where any acknowledgment is taken before a clerk of a court, judge, notary public, or other officer duly authorized by law, with their respective official seals affixed, the above certificate will not be required; nor is such certificate required when the acknowledgment is taken before a register or receiver of a United States land office.

[FORM Q.]

Certificate approving certificate of location and assignment thereof.

ACTS OF JUNE 22, 1860, MARCH 2, 1867, JUNE 10, 1872, AND JANUARY 28, 1879.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington City, D. C., ———, *18*—.

The certificate of location No. ——, for ——— acres, hereto attached, is found free from objection on the records of this office, and, as the assignments of said certificate from ——— ——— to ——— ——— and from ——— ——— to ——— ——— are found in form, the same are hereby approved accordingly.

———,
Commissioner.

To ——— ———.

Fees: ———, paid.

RAILROAD GRANT—LANDS EXCEPTED.

WIGHT *v.* CENTRAL PACIFIC R. R. CO.

Under the excepting clause in the grant to the Central Pacific providing that the odd numbered sections granted are those "to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," the cultivation and improvement of a tract at such time does not constitute a pre-emption claim that has "attached" within the meaning of said grant.

Secretary Bliss to the Commissioner of the General Land Office, July 14,
(W. V. D.) *1898.* (F. W. C.)

The Central Pacific Railroad Company has appealed from your office decision of June 1, 1895, holding that the NW. ¼, Sec. 33, T. 10 N., R. 2 W., Salt Lake City land district, Utah, was excepted from its grant.

The operation of the public land laws was extended to the Territory of Utah July 16, 1868, but a land office was not opened there until March 9, 1869.

The land in controversy is within the limits of the grant to the Central Pacific Railroad Company, the right to which attached October 20, 1868, when the line of road opposite thereto was fixed by filing the required map of definite location.

The tract was listed by the company on account of its grant November 4, 1884, but a patent has not been issued therefor.

January 25, 1894, Wight filed an affidavit in the local office, alleging that at the date of the definite location of the road he had such a claim to this tract as served to except it from the operation of the grant. Upon this affidavit a hearing was had in the local office, the evidence produced being to the following effect:

In the years 1867, 1868 and 1869, Wight was a citizen of the United States and otherwise possessed the qualifications of a pre-emptor. During these years he was the head of a family, with whom he resided in Brigham City, Utah, five miles from the land in controversy. He states that in 1867 he "made a claim" to the land, but fails to state the character of the claim and does not mention a single act done by him in that year in the way of initiating, asserting or establishing the claim. In 1868 he planted and cultivated about ten acres of the tract and harvested the crop grown thereon. In the spring of that year he also began the erection of a house thereon, but the house was never completed, was never occupied, and was subsequently permitted to go to waste. The land was not fenced or enclosed. While he was planting, cultivating and harvesting in 1868 Wight camped upon the land in a wagon but his family remained at the residence in Brigham City, where Wight also lived at all other times. April 12, 1869, he filed in the local office a pre-emption declaratory statement for this land, alleging settlement thereon March 31, 1869, but during that year he abandoned

this filing and all claim to the land upon learning that the railroad company claimed the tract under its grant. No effort to perfect the filing had been made up to the time of instituting this contest.

The local officers held that the evidence did not establish such a claim upon the part of Wight at the date of the definite location October 20, 1868, as would except the land from the grant, and recommended that the contest be dismissed. Upon appeal, your office reversed that decision and held that Wight had at the date of definite location initiated and established a claim to the land sufficient to except it from the grant.

The rights of the parties and the status of the land must be determined by the act of July 1, 1862 (12 Stat., 489), and the amendatory act of July 2, 1864 (13 Stat., 356), making the grant to the Central Pacific. Section 3 of the original act and section 4 of the amendatory act are the ones which specify the extent of the grant and state the exceptions thereto. In Kansas Pacific Ry. Co. *v.* Dunmeyer (113 U. S. 629, 634, 740,) in construing these sections and in determining when the line of road "is definitely fixed," and the effect thereof, the court said:

> The necessity of having certainty in the act fixing this time is obvious. Up to that time the right of the company to no definite section, or part of section, is fixed. Until then many rights to the land along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such rights can attach, because the right of the company becomes by that act vested. It is important, therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to be done by the company. The company makes its own preliminary and final surveys by its own officers. It selects for itself the precise line on which the road is to be built, and it is by law bound to report its action by filing its map with the Commissioner, or rather, in his office. The line is then fixed. The company cannot alter it so as to affect the rights of any other party. Of course, as soon as possible, the Commissioner ought to send copies of this map to the registers and receivers through whose territory the line runs. But he may delay this, or neglect it for a long time, and parties may assert claims to some of these lands, originating after the company has done its duty—all it can do—by placing in an appropriate place, and among the public records, where the statute says it must place it, this map of definite location, by which the time of the vestiture of their rights is to be determined. We concede, then, that the filing of the map in the office of the Commissioner is the act by which "the line of road is definitely fixed" under the statute. Van Wyck *v.* Knevals, 106 U. S. 360.
>
> * * * * * * *
>
> The land granted by Congress was from its very character and surroundings uncertain in many respects, until the thing was done which should remove that uncertainty, and give precision to the grant. Wherever the road might go, the grant was limited originally to five sections, and, by the amendment of 1864, to ten sections on each side of it within the limit of twenty miles. These were to be odd-numbered sections, so that the even-numbered sections did not pass by the grant. And these odd-numbered sections were to be those "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed." When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been

made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted. The grant is limited, by its clear meaning, to the other odd sections, and not to these.

In determining when a pre-emption or homestead claim has "attached" and the effect thereof within the meaning of the exceptions to the grant, the court also said (p. 644):

In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had *attached* to the land, and it therefore did not pass by the grant.

Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds.

This decision was cited with approval in Hastings and Dakota Railroad Co. *v.* Whitney (132 U. S., 357), and Whitney *v.* Taylor (158 U. S., 85). The case last cited involved land claimed to be excepted from the grant to the Central Pacific by reason of a pre-emption claim existing at the date of definite location and in passing upon the case the court said (p. 94):

But it is also true that settlement alone without a declaratory statement creates no pre-emption right. "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose." Lansdale *v.* Daniels, 100 U. S. 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the pre-emption claim. While the cases of Kansas Pacific Railway Co. *v.* Dunmeyer and Hastings & Dakota Railway Co. *v.* Whitney, *supra*, involved simply homestead claims, yet, in the opinion in each, pre-emption and homestead claims were mentioned and considered as standing in this respect upon the same footing. Further, it may be noticed that the granting clause of the Pacific Railroad acts, differing from similar clauses in other railroad grants, excepts lands to which pre-emption or homestead "claims" have attached, instead of simply cases of pre-emption or homestead "rights."

Northern Pacific Railroad Co. *v.* Colburn (164 U. S., 383), is the latest case in point. The Secretary of the Interior had held (L and R. 210, p. 345), that the land there in controversy was in the occupation and cul-

tivation of one Kelly at the time of the definite location of the road and that such occupation and cultivation constituted a sufficient claim to except the land from the company's grant. This decision of the Secretary was held to be conclusive by the supreme court of Montana (13 Montana, 476), but upon appeal to the supreme court of the United States it was said:

> But frequent decisions of this court have been to the effect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office . . . .
>
> Now in this case the allegations are that Kelly never made any entry in the local land office, and the decision of the Secretary of the Interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties, and which is open to review in the courts . . . .
>
> For the reasons above indicated, because the decision of the land department was only on matters of fact and did not conclude the law of the case, and because such facts so found were not of themselves sufficient to disturb the title of the railroad company, the judgment is reversed.

In the case at bar Wight's claim at the date of the definite location of the road was based simply upon his cultivation and improvement of a small portion of the land. Under the decisions of the supreme court cited herein this did not constitute a pre-emption claim which had attached and was not sufficient to except the land from the grant. The decision of your office is accordingly reversed and Wight's pre-emption filing will be canceled.

It is true that some of the departmental decisions have given recognition to claims resting only on settlement, possession, cultivation or improvements existing at the time of definite location, but as applied to grants which are in terms and in legal effect the same as the one now under consideration they are in conflict with the decisions of the supreme court and can not be followed. In this connection it is to be noted that in Northern Pacific Railroad Co. *v.* Colburn, *supra*, the court called attention to a difference between the terms of the grant to the Northern Pacific and those of the grant to other Pacific railroads under the acts of July 1, 1862, and July 2, 1864, *supra*, and reserved the same "for consideration in the future progress of the case."

APPLICATION TO ENTER—SETTLEMENT RIGHT.

McDade *v.* Hively.

An application to enter land made after a final judgment canceling a prior entry thereof is entitled to the same consideration, and has the same force and effect as against all persons other than the successful contestant, as if no preference right had been awarded.

The right of a settler on land at the time of the cancellation of a prior entry thereof, if asserted within the statutory period, will not be defeated by an adverse intervening application to enter.

Secretary Bliss to the Commissioner of the General Land Office, July 14, 1898.
(W. V. D.) (G. B. G.)

Mary McDade has appealed from your office decision of December 14, 1896, dismissing her contest against the homestead entry of Catherine Hively for lots 3 and 4 and the E. ½ of the SW. ¼ of Sec. 7, T. 12 N., R. 6 W., Oklahoma, Oklahoma Territory.

This land was at one time covered by the homestead entry of one Thomas McDade, which entry was contested by Thomas Kollar, as a result of which contest the said Thomas McDade's entry was, by departmental decision of September 18, 1895 (21 L. D., 153), directed canceled. On review, said departmental decision was, on January 13, 1896, adhered to, and, on January 30, 1896, your office closed the case.

On January 28, after the decision of the Department on review of the case, but before promulgation by your office, the defendant herein, Catherine Hively, filed her homestead application for the land, which application was suspended by the local officers.

Kollar waived the preference right awarded him by virtue of his successful contest against Thomas McDade's entry, and on March 25, 1896, the said Mary McDade filed her homestead application for the land, and on May 21, 1896, she filed an amended affidavit, alleging that she was a settler on the land January 30, 1896, and had resided thereon ever since.

On June 6, 1896, the local officers placed Hively's application of record, and rejected the application of McDade. From this action McDade appealed. Your office, on December 14, 1896, approved the action of the local officers, and, on review, March 15, 1897, refused to reopen the case.

The contention of the appellant is, that her settlement on the land gave her the superior right, and that Hively's application to enter was made when the land was not subject to entry.

The controlling question raised by this appeal has been recently considered by the Department in the case of John W. Korba, 24 L. D., 408, wherein it was held (syllabus):

An application of a third party to enter land embraced within a judgment of cancellation, rendered by the Department, should be received and held to await action on the part of the successful contestant; and if the preferred right of the said contestant is subsequently waived, the application to enter, so held in abeyance, is entitled to precedence as against other claims arising subsequently thereto.

This ruling is based on the principle announced in the case of McDonald *et al. v.* Hartman *et al.* (19 L. D., 547), that

a judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date, without regard to the time when such judgment is noted of record in the local office.

These principles are not in conflict with the rule laid down in Allen *v.* Price (15 L. D., 424), wherein it was said that if an application to enter is presented by a stranger to the record during the statutory period provided for the exercise of a successful contestant's preference right of entry, "it should be held in abeyance to await the action of the contestant."

From the moment of time that a judgment of cancellation has been rendered by the Department, the land involved is subject to entry by any qualified person, but an entry thereof by a stranger to the record or a third party may be defeated by the exercise of a successful contestant's preference right. In the interest of good administration, therefore, the rule in Allen *v.* Price, *supra*, was adopted, but this rule does not militate against any substantial right acquired by strangers to the record and third parties by virtue of initial steps taken by them to acquire title to the land after such final judgment of cancellation has been rendered.

An application to enter land made after a final judgment by the Department canceling a prior entry thereof is entitled to the same consideration, and has the same force as against all persons other than the successful contestant, as if no preference right had been awarded. In such a case the right of the applicant to enter the land attaches as of the date of the application.

This being so, it results in the case at bar that Catherine Hively's rights attached January 28, 1896. In this view her claim must prevail, unless defeated by the prior settlement claim of Mary McDade.

In the appeal it is stated by attorneys for McDade that her settlement on the land in controversy "was made January 13, 1896," and that "she makes a prima facie showing of settlement on or before January 28, 1896."

In McDade's amended affidavit, filed May 21, 1896, it is stated that she "was an actual resident thereon on January 30, 1896, with valuable improvements on said tract, and am (was) the first settler thereon."

This allegation lacks precision. It was probably so framed because of an erroneous view of the law as to the status of land embraced in contest proceedings after final judgment, it being believed that no rights were secured by a settlement on the land in controversy prior to January 30, 1896, the date your office closed the case of Kollar *v.* Thomas McDade.

Under all the circumstances, it is believed that the allegation is sufficient to put the government upon inquiry.

If Mary McDade was a settler upon the land in controversy in good faith, claiming it as her home, prior to and at the time Hively filed her application to enter, McDade has the better right thereto. Her application to enter of March 25, 1896, protected her settlement right, if she had one. It is not material that her allegation of settlement and residence, made in her amended affidavit of May 21, 1896, was more

than three months after the cancellation of Thomas McDade's entry. The amended affidavit related back to her application of March 25, 1896.

The decision appealed from is modified to conform to these views, and the case remanded, with directions to order a hearing between the parties, on condition that Mary McDade, within thirty days from notice of this decision, files in your office a sworn statement that she was a settler on the land prior to and on January 28, 1896.

CEDED CHIPPEWA PINE LANDS, MINNESOTA.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 14, 1898.

REGISTERS AND RECEIVERS,
Crookston and Duluth, Minn.

GENTLEMEN: Under the provisions of the act of January 14, 1889 (25 Stat., 642), the Chippewa Indians have ceded and relinquished portions of the Red Lake Reservation, in the State of Minnesota.

The examination of some of the ceded lands of the former Red Lake Reservation has been made, as provided in the fourth section of the act referred to, and it is proposed to offer the lands which have been found to be "pine land" within the meaning of the statute.

Annexed hereto is a copy of the fifth section of said act of January 14, 1889, as amended by the act of February 26, 1896 (29 Stat., 17), which makes provision for the disposal of said "pine lands."

There is also annexed a descriptive list of the said lands, giving the quantity of pine timber reported by the examiners as having been found on each legal subdivision, and the appraised value of each tract.

The law directs that these lands shall be offered for sale at public auction to the highest bidder for cash, at not less than the appraised value, and provides that the lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the proper local land office.

The offering of the lands within the Duluth district will commence at the district land office at Duluth at 9 a. m. on August 2, 1898, and the offering of the lands within the Crookston land district will commence at the district land office at Crookston at 9 a. m. on August 16, 1898, and will continue from day to day until each tract described in the annexed list shall have been offered for sale.

You will make such arrangements in advance as may be necessary and proper for the sale, but you will employ no additional force nor purchase any supplies without first obtaining authority from this office. At the time fixed for the offering you will offer the lands by the smallest legal subdivision, in the order in which they appear in the annexed list, diligently proceeding until all of the lands shall have been offered and either sold or left unsold for want of a sufficient bid.

You will previously provide a suitable list of the lands in your respective districts by the smallest legal subdivisions as they are to be offered, with a heading which shall designate it as a list of the offerings of the ceded Chippewa pine lands under the acts of January 14, 1889, and February 26, 1896, and you will enter thereon the offering of every tract as it is made, giving the date of the offering and indicating the result, with the number of entry, name of purchaser, and amount of bid, if sold, and if not sold giving the reason therefor. Any tract bid off and the purchase money therefor not paid will be again offered on the next succeeding day. Should any party fail to pay the amount of his bid for a tract of land after the same is awarded to him, you will not thereafter recognize a bid by such party.

For the payments made the receiver will issue receipts of Form 4–131, properly modified, to be numbered consecutively in the order of their issue, Chippewa series. The register will issue cash certificates of Form 4–189, properly modified by the insertion of the date of the act under which the sale is made.

At the close of the offering you will make to this office a joint report of your proceedings and forward therewith a clear transcript of the list of offerings, kept as hereinbefore directed, retaining the original on your files. You will properly enter the sales made on your records.

Any of the lands remaining unsold will, after the offering, be held subject to private sale for cash at not less than the appraised value thereof. No application for the purchase of any tract at private sale will be entertained until the termination of the offerings at your respective offices. Parties desiring to purchase at private sale will be required to make application of Form 4–001, properly modified, and the applications will be numbered consecutively in the order of their presentation at your respective offices, current number at each office, and be retained on your files.

The receipts and certificates issued for lands sold at public and private sale will be given the current numbers. The certificates and receipts issued for the sales at the public offering will be distinguished by noting thereon the words *public sale Chippewa pine lands;* those issued for the private entries of the pine lands by noting thereon the words *private sale Chippewa pine lands.*

The receipts issued for moneys received for said lands will be issued in duplicate and the duplicate receipt given to the purchaser.

Where one party purchases, at either public or private sale, more than one legal subdivision, you will not embrace in one certificate and receipt a greater number of subdivisions than can be easily written in the blank spaces left in the blank forms for that purpose without interlining. Where tracts in more than one section are embraced in one entry, the descriptions should appear in the numerical order of the sections, but entries should not cover more than 640 acres each, and should, when practicable, be confined to one township and range.

You will report the sales of these lands on separate abstracts, to be

forwarded with your regular monthly returns, together with any receipts and certificates issued for these lands during the month. The abstracts forwarded for the month, including the time of the public sale, will have the sales then made indicated thereon by the words, *public sale*, written opposite the entry of each on the abstracts. You will also report an account for the moneys received from the sales of these lands in separate monthly and quarterly returns.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved:
C. N. BLISS,
Secretary.

AN ACT to amend an act entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fifth section of the Act of Congress passed January fourteenth, eighteen hundred and eighty-nine, providing for the relief and civilization of the Chippewa Indians in the State of Minnesota, be, and the same is, amended so far as the same relates to the White Earth and Red Lake reservations, and as to the other reservations mentioned in said Act whenever all the allotments of land in severalty shall have been made to the Indians of each reservation, respectively, therein provided, so as to read as follows:

"SEC. 5. That whenever, and as often as the survey, examination, and appraisal of one hundred thousand acres of said pine lands, or of a less quantity, in the discretion of the Secretary of the Interior, have been made, the portion so surveyed, examined, and appraised shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall cause notices to be inserted once in each week, for four consecutive weeks, in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth, Stillwater, Taylors Falls, Fosston, Saint Cloud, Brainerd, Crookston, and Thief River Falls, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia, Pennsylvania; and Boston, Massachusetts, of the sale of said land at public auction to the highest bidder for cash, at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same, upon application at the local land office: *Provided,* That sections numbered sixteen and thirty-six in each township so surveyed shall not be sold until the claim of the State of Minnesota to the ownership of said sections as part of the school lands of said State, shall have been determined."

Approved, February 26, 1896. (29 Stat., 17.)

[Schedule of appraisement omitted.]

MINING CLAIM—ADVERSE PROCEEDINGS—ENTRY.

MUTUAL MINING AND MILLING CO. *v.* CURRENCY CO.

A charge that the discovery on which a mineral application rests is upon ground covered by a prior valid subsisting location raises an issue that must be settled in the courts, under the proper statutory adverse proceeding, and on failure to so present such charge it can not be entertained by way of protest against the issuance of patent.

A mineral entry irregularly allowed during the pendency of adverse proceedings will not be canceled for such irregularity, where, subsequently thereto, the adverse is dismissed, leaving the applicant in the same status as though no adverse claim had been filed.

Secretary Bliss to the Commissioner of the General Land Office, July 15, (W. V. D.) *1898.* (E. B., Jr.)

This is an appeal by the Mutual Mining and Milling Company from the decisions of your office dated October 22, 1896, and January 12, 1897, dismissing its protests against the issue of patent to The Currency Mining Company for the Engineer lode claim, mineral entry No. 927, Pueblo, Colorado, land district.

On December 7, 1892, the latter company filed applications for patent for the said Engineer claim, and for the Amy lode claim, the claims being contiguous and both embraced in lot No. 7555, the survey of which was approved September 3, 1892. These applications were treated by the local office as an application for a single claim. They were given the same number, and but one fee was charged for their filing. Notice as of a single application covering both claims was posted on each claim and in the local office, and published in a newspaper. During the period of publication, claimants of the Dan McDonald lode location filed an adverse claim against the application for patent to the Engineer claim, and duly commenced suit in support thereof in the district court in and for El Paso county, Colorado. No adverse claim appearing against the application for the Amy claim, the Currency Company made entry therefor on May 2, 1895, and patent for the same issued on November 30, 1895. On November 27, 1895, judgment in the said suit was entered in favor of the Dan McDonald claimants, whereby the ground in conflict, which included the discovery shaft of the Engineer location, was awarded to the Dan McDonald claimants as prior locators. From this judgment the Currency Company duly appealed to the Colorado court of appeals.

On February 20, 1893, the appellant here, The Mutual Mining and Milling Company, filed a protest against the issuance of patent to the Currency Company. This protest was dismissed by the local office on June 16, 1896, on the ground that the allegations thereof were not deemed sufficient to warrant a hearing, and, on June 18th, following, without waiting for the exercise by the protestant of its right of appeal,

or until final disposition had been made of said suit, the Currency Company was allowed to make entry for so much of the Engineer location as remained after excluding the ground in conflict with the Dan McDonald location, survey No. 8053, and with the said patented Amy claim. Although notified of the dismissal of the said protest, the protestant company filed no appeal therefrom. Additional protests by the said Mutual Company were filed, however, on July 15, July 28th, and December 1, 1896, respectively.

Taken together, and briefly stated, these protests allege, *inter alia:*

1. That the protestant company is the owner of the Mollie Gibson lode claim, under a location thereof made prior to the location of the Engineer claim, and that these claims conflict to the extent of more than four acres.

2. That the notice of application for patent was insufficient in substance under the rule in Gowdy *et al. v.* Kismet Gold Mining Co. (22 L. D., 624), and was not posted in a conspicuous place on the Engineer claim.

3. That improvements and labor on the Engineer claim as entered, to the value of $500, were not made or done, nor the certificate of the surveyor-general showing expenditure thereon to that amount filed, prior to the expiration of the sixty days' publication of notice.

4. That the Dan McDonald claimants had obtained judgment in the lower court against the Currency Company in their suit against said company in support of an adverse claim, whereby the ground involved, including the Engineer discovery shaft, was awarded to the Dan McDonald claimants, and that said suit was still pending on appeal by the Currency Company.

5. That if any discovery within the limits of the Engineer claim has been made in ground not in conflict with the Dan McDonald claim, such discovery was upon the Mollie Gibson claim, a prior location, and hence of no avail to the Currency Company.

The said decisions of your office, the latter on review, dismissed appellant's protests on the ground that they were insufficient, in view of the facts shown, to warrant a hearing, and thereby, in effect, held that there had been a sufficient compliance with law in the particular matters which formed the basis of the protestant's charges against the Currency Company: wherefore the appeal by the said Mutual Mining and Milling Company, which brings the case before the Department.

The facts as to the substance of the notice of the Engineer application, posting notice on the claim, and the improvements and labor thereon by claimant and its grantors, and the certificate of the surveyor-general, are fully and with substantial accuracy set out in your said office decisions and need not be re-stated here. The questions raised by the protest upon these points may be passed without discussion. No reversible error is found in the decisions of your office upon these questions. The allegations of protestant numbered 4 and 5 as herein-

before stated, raised the questions whether the Engineer location was made in compliance with law, and whether, if originally defective, the defect has since been cured, and the location validated, and, incidentally, whether entry of the Engineer claim was properly allowed while the adverse suit instituted by the Dan McDonald claimants was pending.

It appears from the evidence that the Engineer claim was located April 25, 1892, and that the Dan McDonald and Mollie Gibson claims were located on July 17th and October 21, 1891, respectively; that the Dan McDonald conflicts with the Engineer on the southeast side of the latter to the extent of nearly four-tenths of an acre, including the discovery shaft of the Engineer; that the Mollie Gibson conflicts with the Engineer as to nearly all the remainder of the ground embraced in the Engineer location; and that no adverse claim to any part of the Engineer location was filed by the claimants of the Mollie Gibson.

It further appears now, from the duly certified transcript, filed July 8, 1898, of proceedings in the suit hereinbefore mentioned, that on October 11, 1897, the said court of appeals, for

> manifest error in the proceedings and judgment aforesaid, of said district court. . . . . reversed, annulled, and altogether held for naught,

the said judgment, and remanded the cause for further proceedings (For the decision of the court see Currency Mining Co. *v.* Bentley *et al.*, 50 Pac. Rep., 920); that thereafter, on December 3, following, the said cause was taken to the supreme court of the State by writ of error; that the writ was subsequently dismissed by stipulation, and on June 28, 1898, the mandate of the court of appeals was renewed; and that, on July 2, 1898, in the said district court, the cause was finally dismissed on motion of the Currency Company "and upon stipulation of the parties."

This leaves the Currency Company, as to the rights it claims under the Engineer location and application, precisely as if no adverse claim had been filed. In this situation, applying the language of section 2325 Revised Statutes,

> it shall be assumed that the applicant is entitled to a patent . . . . and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

No showing has been made by protestants, under the last clause of the statute as above set out, sufficient to defeat the Engineer application and prevent the issuance of patent. Protestants can not now be heard to charge that the Engineer discovery shaft, or the discovery of mineral on the Engineer location, was upon ground covered by a valid, subsisting, prior location. They waived their right to be heard upon such a charge when they failed to file and prosecute an adverse claim, as provided and required by section 2326 Revised Statutes (Golden Reward Mining Co. *v.* Buxton Mining Co., 79 Fed. Rep., pp. 873–4;

Gowdy et al. *v.* Kismet Gold Mining Co., 22 L. D., 624; and American Consolidated Mining Co. *v.* DeWitt, 26 L. D., 580). Furthermore, the proper court, and not the land department, is the tribunal authorized to hear and determine upon such an allegation.

If it be conceded that the allowance of the Engineer entry while the said adverse suit was still pending, was, notwithstanding the exclusion therefrom of the ground claimed by the Dan McDonald claimants, in contravention of the provision of section 2326 Revised Statutes, which requires a stay of proceedings "until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived," and therefore irregular and improper, it is still not deemed such an irregularity as to warrant the cancellation of the entry. No good purpose would be served by such action. The applicant is now clearly entitled to an entry, and, if the present entry were canceled, could at once make a new entry. The irregularity, if any, in question will therefore be waived.

It is proper, in this connection, to call attention to the facts that the Engineer location as surveyed for patent conflicts with the location of the Surprise lode location, survey No. 7499, and that the conflict is excluded in the Engineer application and notices. It was not excluded, however, as it should have been, from the said entry, except as to so much thereof as is embraced in the conflict between the Dan McDonald and Engineer locations. It will therefore be necessary to have the entry amended so as to show the exclusion of the Surprise Engineer conflict.

There appears to be no reason now why any of the ground in conflict between the Engineer and Dan McDonald locations should be excluded from the said entry. Further amendment thereof may accordingly be allowed upon due payment for the ground covered thereby.

The decisions of your office are affirmed in accordance with the foregoing.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

JOHN BARKER.

The fact that an entry may have been "erroneously allowed" is no ground for repayment, if said entry could have been confirmed if the entryman had not voluntarily relinquished the same.

Secretary Bliss to the Commissioner of the General Land Office, July 15, 1898.

(W. V. D.) (J. L. McC.)

John Barker, on April 21, 1877, made desert land entry for the NE. fractional quarter and the NW. fractional quarter of Sec. 4, T. 29 S., R. 29 E., Visalia land district, California. On April 15, 1886, he relinquished the NW. fractional quarter; and on July 12, 1889, he relinquished the NE. fractional quarter.

At the date of the above entry the land described was embraced in certain homestead entries which were subsequently canceled.

Barker applied to your office for the repayment of the purchase money paid on said entry, which was denied by your office decision of January 28, 1897.

Barker has appealed, alleging certain errors, which will be considered *seriatim*.

First, he alleges that your office "erred in holding that an entry erroneously allowed can be confirmed"—presumably referring to the fact that the land embraced in said desert land entry was at the date of said entry covered by certain then uncanceled homestead entries (*supra*).

This contention can not be sustained. Many entries that were originally erroneously allowed have been confirmed. A departmental decision directly applicable, as regards this question, is that in the case of Calhoun *v.* Daily (14 L. D., 490—see syllabus):

The irregular allowance of a homestead application for land covered by the entry of another, and subsequent compliance with law on the part of said applicant, gives him a right that will attach on the cancellation of the prior entry.

So a homestead entry by one who is not a citizen, nor has declared his intention to become a citizen, is erroneously allowed; but upon his subsequent declaration of intention (prior to the intervention of an adverse claim) the defect may be cured and the entry perfected. (See Vidal *v.* Bennis, 22 L. D. 124.)

Many other instances of a similar character might be cited.

Counsel for the applicant contends that your office erred (2) "in holding that the applicant was under any obligations to complete an entry which it is admitted was erroneously allowed."

It may be true that he was not under any "obligations" to complete it; but if he chose not to do so and voluntarily relinquished, when (as hereinbefore shown) it might have been confirmed, the government is under no obligation to refund his purchase money. (Hiram H. Stone, 5 L. D., 527-8; Albert S. Hovey, 9 L. D., 670; and many other cases.)

Counsel for the applicant alleges that your office erred (3) "in not holding that a desert land-entry within the limits of a railroad grant, at the stated price of $1.25 per acre, could not be confirmed."

This is simply an assumption on the part of counsel for the defendant. It is sufficient to say that defendant did not wait to see whether the entry could be confirmed or not, but relinquished; and the entry was canceled because of his relinquishment, and not because it could not be confirmed.

Finally, counsel for the applicant contends that your office erred—

In not holding that the suspension of the applicant's entry by the Secretary's order of 1877, which suspension was not removed until 1891, left the claimant free to consider such suspension as in effect a cancellation of his said entry, and therefore to abandon the same and apply for repayment.

Whatever the claimant may have considered, the suspension of an entry is not equivalent to its cancellation.

As a matter of fact, this entry was canceled, not because it could not be confirmed, but because the entryman voluntarily relinquished it; and there is no law allowing repayment in such a case.

The decision of your office is correct, and is hereby affirmed.

SETTLEMENT RIGHT—APPLICATION TO ENTER.

MOORE *v.* PARKER.

Where through the failure of the local office to properly note of record an entry the land covered thereby is apparently embraced within a railroad grant, and is settled upon and improved by one intending to purchase the same from the railroad company, and it is subsequently found that said land was in fact excepted from said grant, the right of such settler to make homestead entry of the tract will not be defeated by the adverse intervening application of another.

Secretary Bliss to the Commissioner of the General Land Office, July 15, 1898.

(W. V. D.) (C. W. P.)

The appeal of Frank F. Parker from your office decision of February 21, 1898, holding his homestead entry of the NW. ¼ of Sec. 1, T. 22 N., R. 10 E., O'Neill land district, Nebraska, for cancellation, and allowing John B. Moore to make homestead entry of the same tract, has been considered by the Department.

It appears from the record that the land in controversy is within the granted limits of the grant for the Sioux City and Pacific Railroad Company and is opposite that portion of the road definitely located January 4, 1868; that on March 10, 1892, Frank F. Parker tendered his homestead application for the tract, which was rejected for conflict with the grant, from which action he appealed; that April 15, following, John B. Moore tendered his homestead application for the same land, which was also rejected for conflict with the grant, and also on account of the prior application by Parker, from which action Moore appealed; that on said appeals it was held by your office that this tract was excepted from the grant for said company by reason of the homestead entry of John Drown, made June 14, 1867, and canceled January 7, 1869, and you awarded the right of entry to Parker, from which action Moore appealed to the Department; that by decision of January 8, 1897, the Department decided that it appearing that Moore had, May 16, 1888, conveyed the land to one A. J. Devinney, for the consideration of $241.50, when Parker applied, March 14, 1892, to make homestead entry of the tract, whatever claim Moore ever had to the land had been abandoned by said sale, and affirmed your office decision; that on a motion for review of said decision by Moore, a hearing was ordered, in order that all the facts relative to the occupancy and improvement of this tract, the steps taken by Moore in order to secure himself in his

possession and the alleged failure to note upon the local records the entry by Drown until after the tender of the application by Parker, may be properly presented, to the end that the respective rights of the applicants under their claims as shown may be properly determined, and the local officers were directed to proceed with the hearing at the earliest practicable date, and that when the record is received in your office the same be made special for consideration, so that the rights of the parties may be early determined, and the local officers were further instructed, when reporting the hearing, to make special report of any facts within their knowledge, or as evidenced by their records, showing when the entry by Drown was posted, or noted, upon the plats and records usually resorted to in the examination of the status of lands, and the previous decision of the Department was modified accordingly.

Upon the hearing held in conformity with said instructions, the local officers recommended that the homestead entry of Parker be canceled, and the application of Moore to homestead the tract be allowed. On appeal, your office affirmed the decision of the local officers; hence this appeal to the Department.

So far as the record shows, the first settler on the tract in controversy was one Hiram Thurston, who was succeeded by W. B. Johnson; after whose death, his widow, Elizabeth A. Johnson, occupied the tract, and in March, 1887, conveyed her interest to Elias H. Little, who, on March 22, 1888, conveyed his interest in the tract to the said John B. Moore, for the consideration of $670. Moore took possession of the land and has continued to occupy it as a home. He was not married at the time he purchased the tract, but was in February, 1890, and his wife has lived with him on the land ever since their marriage.

The improvements on the land, when Moore purchased it from Little, consisted of two dwelling houses, a root house, a granary, a chicken house, a horse and cow stable, a well, and forty acres of land in cultivation and a number of fruit trees and other trees and shrubbery, and about one hundred rods of fence.

Moore has added something to the improvements on the land at the time of his purchase by breaking more ground and putting out both forest and fruit trees. He testified that at the time he purchased the tract it was known as "lost title land," and that he was informed that the railroad company claimed the tract; that he went to see the firm of Peterson and Force, attorneys and real estate agents, who he was told were the agents for the Sioux City and Pacific Railroad Company, the company that claimed the tract, and saw Mr. Force of said firm and inquired of him if the tract could be bought from the company; that Mr. Force told him that the company's title had not been completed, and that the land had not been patented to it; that he had examined the records in the local land office, and that he believed from what he had learned that the company's title would be perfected in time, and later they would offer the land for sale. Moore also testified

that he had consulted Mr. C. T. Dickinson, who is now district judge, and was then considered one of the best lawyers in the county, and that the advice he received from Mr. Dickinson "was in harmony with that of Mr. Foree, namely, that the railroad company's title would eventually be completed." Mr. Foree confirmed Moore's testimony in regard to Moore's interview with him. He also testified that the firm of Peterson and Foree, of which he was a member, was the sole local agent for the county for the Missouri Valley Land Company, of Cedar Rapids, Iowa, which company had bought the lands of the Sioux City and Pacific Railroad Company, which company claimed the land in controversy under its railroad grant. He further testified that in 1888 or 1889 he examined the records of the local land office as to the tract in controversy; that he examined the tract book and the plat book, and that he found no homestead entry of the tract in controversy in the name of John Drown on either the plat book, or the tract book, and that no other books were shown to him by the officers of the land office for the purpose of showing the filings; that he never heard of such a book as the homestead register at any time, when he was at the local land office examining title to government lands.

The local officers transmitted with their decision of the case a transcript of the tract book in their office showing the entries of land in Sec. 1, T. 22 N., R. 10 E., which shows that John Drown made homestead entry No. 1224 (in pencil 1424) of the NE. ¼, June 14, 1867, canceled January 7, 1869. In their special report they state that: "The Register of Homestead Entries shows No. 1224 (the number entered *in ink* on John Drown's entry on tract book) to be that of Louis Marden, made May 6, 1867, for NE. ¼, Sec. 13, T. 22, R. 8 E.;" that "The Register of Homestead Entries shows No. 1424 (the number noted in pencil on John Drown's entry on tract book) to be that of John Drown for the NW. ¼, Sec. 1, T. 22, R. 10 E., made June 16, 1867;" that "The Plat Book shows no entries on NW. ¼ 1–22–10 E., except the R. R. Co.'s selection and the entry of Frank F. Parker;" that it has the appearance, however, of having numbers of entries erased therefrom;" and they state, in their decision, that the plat and tract books are the books usually resorted to at the local office in looking up the status of government land.

It is shown that Parker made an examination of the records, at the Neligh land district office about the 2d or 3d of March, 1892, to ascertain if there was any vacant government land in Burt county, and concluded from such information as he then acquired that he could secure an entry on the NW. ¼ of Sec. 1, T. 22 N., R. 10 E., and on March 10, 1892, filed an application to enter the land in controversy, which was rejected March 14, 1892. He alleges he was first acquainted with Moore in the spring of 1892, when he sought and met him about half a mile from the land, and told Moore of his having filed an application to make homestead entry for the land, and offered to buy Moore's

improvements, and subsequently, when he learned of your office decision of September 12, 1894, in his favor, because of his priority of application, he again approached Moore, with an offer to buy his improvements, which offer Moore finally declined. It also appears that he has established residence upon a part of the land in controversy, with his wife and thirteen children, and has made considerable and valuable improvements thereon. As to the deed to Devinney, it appears by the testimony of Moore that it was intended as a mortgage to secure a debt, and not as a sale of the claim. It is also shown that Moore never gave up his possession of the land, and that the consideration mentioned in the deed is far below the value of the improvements upon the land. It also appears that Devinney and wife, by deed dated March 23, 1892, reconveyed the property to Moore. The evidence shows that Moore had been in possession of the land in controversy for four years—living on it with his family and having valuable improvements thereon—relying upon the title of the Sioux City and Pacific Railroad Company, which, according to the records of the local land office, usually resorted to in looking for the status of government lands, was apparently a valid title, and supposing that he would eventually secure title to the land from the vendees of the railroad company, when Parker having discovered by an examination of the records of the local land office, that Drown had made homestead entry, not of the NE. ¼, as the tract and plat book showed, but of the NW. ¼, thereupon applied to make entry of the land in controversy, and now claims the land by virtue of his prior application to make homestead entry of the same. But the Department cannot consent to recognize such a claim. Moore's residence and occupation were sufficient to put Parker upon notice and inquiry, and Moore plainly was only prevented from acquiring the prior title to the land by the failure of the local officers to make the proper entries on the tract and plat books in their office. His case is clearly stronger in equity and he should be allowed to make homestead entry of the land.

Your office decision is therefore affirmed.

NORTH PERRY TOWNSITE *v.* LINN.

Motion for review of departmental decision of March 15, 1898, 26 L. D., 393, denied by Secretary Bliss, July 16, 1898.

REGULATIONS CONCERNING RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIRS OVER THE PUBLIC LANDS AND RESERVATIONS.

For irrigation—Under sections 18 to 21, act of March 3, 1891 (26 Stat., 1095), the act of February 26, 1897 (29 Stat., 599), and the act of May 11, 1898 (Public, No. 88).
For oil pipe lines—Under act of May 21, 1896 (26 Stat., 127).
For the construction of reservoirs on public lands for watering live stock—Under act of January 13, 1897 (29 Stat., 484).

[Approved July 8, 1898.]

RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIRS.

Sections 18, 19, 20, and 21 of the act of Congress approved March 3, 1891 (26 Stat., 1095), entitled "An act to repeal timber-culture laws, and for other purposes," grant the right of way through the public lands and reservations of the United States for the use of canals, ditches, and reservoirs heretofore or hereafter constructed by corporations, individuals, or associations of individuals upon the filing and approval of the certificates and maps therein provided for; but the word "reservations," as here used, does not include Indian reservations (14 L. D., 265).

When the right of way is upon a reservation not within the jurisdiction of the Interior Department, the application must be filed in accordance with these regulations, and will be submitted to the department having jurisdiction. A map and field notes of the portion within such reservation must be submitted, in addition to the duplicates required herein. This map and field notes must conform to all the provisions of this circular. The local officers will forward them to this office with the application.

The word *adjacent*, as used in section 18 of the act, in connection with the right to take material for construction from the public lands, is defined by the Department as including the tier of sections through which the right of way extends, and perhaps an additional tier of sections on either side (14 L. D., 117). The right extends only to construction, and no public timber or material may be taken or used for repair or improvements (14 L. D., 566). These decisions were rendered under the railroad right of way act, and are applied to this, as the words are the same in both.

The sections above noted read as follows:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of

location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in a case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

The act approved May 11, 1898 (Public No. 88), entitled "An act to amend an act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes," makes an important declaration in section 2 as to the purposes for which the rights of way under the act of 1891 may be used. The language of the act of 1898 is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

1. These acts are evidently designed to encourage the much needed work of constructing ditches, canals, and reservoirs in the arid portion of the country by granting right of way over the public lands necessary to the maintenance and use of the same. The eighteenth section of the act of 1891 provides that—

The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

The control of the flow and use of the water is therefore, so far as this act is concerned, a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands. In submitting maps for approval under this act, however, which in anywise appropriate natural sources of water supply, such as the damming of rivers or the appropriation of lakes, such maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which the same is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed in support thereof.

2. The act is not in the nature of a grant of lands; it does not convey an estate in fee in the right of way. It is a right of use only, the title still remaining in the United States. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the same subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this Department. By section 21 of the act above quoted it will be seen that the approval of a map of a canal, ditch, or reservoir does not necessarily carry with it a right to the use of land 50 feet on each side, the approval of the Department granting only such right of way as the law provides. The width necessary for construction, maintenance, and care of a canal, ditch, or reservoir is not determined.

3. Whenever a right of way is located upon a reservation, the applicant must file a certificate to the effect that the right of way is not so

located as to interfere with the proper occupation of the reservation by the Government. When the right of way is located on a forest or timber reserve, the applicant must file a stipulation under seal to take no timber from the reservation outside the right of way. In accordance with the provisions of the circular of March 21, 1898, the applicant will also be required, if deemed advisable by the Commissioner of the General Land Office, to give bond in a satisfactory surety company to the Government of the United States, to be approved by him, such bond stipulating that the makers thereof will pay to the United States "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office.

4. Canals, ditches, or reservoirs lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see paragraphs 17 and 18.)

5. Any incorporated company desiring to obtain the benefits of the law is required to file the following papers and maps with the register of the land district in which the canal, ditch, or reservoir is to be located, who will forward them to the General Land Office, where, after examination, they will be submitted to the Secretary of the Interior with recommendation as to their approval.

First. A copy of its articles of incorporation, duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized (when organized under State or Territorial law), with certificate of the governor or secretary of the State or Territory that the same is the existing law. (See eleventh subdivision of this paragraph.)

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of the State or Territory is required that it has complied with the laws of that State or Territory governing foreign corporations to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under the seal of the company, of the proper officer that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State or Territory, and that the copy of the articles filed is true and correct. (See Form 1, p. 212.)

Sixth. A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (See Form 2, p. 213.)

Seventh. A copy of the company's title or right to appropriate the water needed for its canals, ditches, and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit used in such title, its equivalent in cubic feet per second must be stated. In cases where the right to appropriate the water has not been adjudicated under the local laws, a certified copy of the notice of appropriation will be sufficient. In cases where the notice of appropriation is accompanied by a map of the canal or reservoir, it will not be necessary to furnish a copy of it, if the notice describes the location sufficiently to identify it with the canal or reservoir for which the right of way application is made. In cases where the water-right claim has been transferred a number of times it is not necessary to furnish a copy of each instrument of transfer; an abstract of title will be accepted.

Eighth. A copy of the State or Territorial laws governing water rights and irrigation, with the certificate of the governor or secretary of the State or Territory that the same is the existing law. (See eleventh subdivision of this paragraph.)

Ninth. A statement of the amount of water flowing in the stream supplying the canal, ditch, or reservoir, at the point of diversion or damming, during the preceding year or years. For this purpose it will be necessary to give the maximum, minimum, and average monthly flow in cubic feet per second, and the average annual flow. All available data as to the flow is required. The method of measurement or estimate by which these results have been obtained must be fully stated.

Tenth. Maps, field notes, and other papers, as hereinafter required.

Eleventh. If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of the State or Territory, the applicant may file, in lieu of the requirements of the second and eighth subdivisions of this paragraph, a certificate of the governor or secretary of state that no change has been made since a given date, not later than that of the laws last forwarded.

6. Individuals or associations of individuals making applications for right of way are required to file the information called for in the seventh,

eighth, ninth, and tenth subdivisions of the previous paragraph. Associations of individuals must, in addition, file their articles of association; if there be none, the fact must be stated over the signature of each member of the association.

7. The maps filed must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey thereof. The maps should show other canals, ditches, laterals, or reservoirs with which connections are made, but all such canals, reservoirs, etc., with which connection is made must be represented in ink of a different color from that used in drawing those for which the applicant asks right of way.

8. Field notes of the surveys must be filed in duplicate, should be separate from the map, and in such form that they may be folded for filing. Complete field notes should not be placed on the map, but only the station numbers where deflections or changes of numbering occur, station numbers with distances to corners where the lines of the public surveys are crossed, and the lines of reference of initial and terminal points, with their courses and distances. Typewritten field notes with clear carbon copies are preferred, as they expedite the examination of applications. The field notes should contain, in addition to the ordinary records of surveys, the data called for in this and in the following paragraphs. They should state which line of the canal was run—whether middle or side line. The stations or courses should be numbered in the field notes and on the map. The record should be so complete that from it the surveys could be accurately retraced by a competent surveyor with proper instruments. The field notes should show whether the lines were run on the true or the magnetic bearings, and in the latter case the variation of the needle and date of determination must be stated. The kind and size of the instrument used in running the lines and its minimum reading on the horizontal circle should be noted. The line of survey should be that of the actual location of the proposed ditch and, as exactly as possible, the water line of the proposed reservoir. The method of running the grade lines of canals and the water lines of reservoirs must be described.

9. The scale of the map should be 2,000 feet to an inch in the case of canals or ditches and 1,000 feet to an inch in the case of reservoirs. The maps may, however, be drawn to a larger scale when needed to properly show the proposed works; but the scale must not be so greatly increased as to make the map inconveniently large for handling.

10. All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way must be shown the smallest legal subdivisions (40-acre tracts and lots).

11. The applicant should mark each of the subdivisions affected by the right of way "V" or "Vacant" if it belongs to the public domain

at the time of filing the map in the local land office, and the same must be verified by the certificate of the register. If it does not affirmatively appear that some portion of the public land is affected, the local officers will refuse to receive the maps. (See paragraph 25.)

12. The termini of a canal, ditch, or lateral should be fixed by reference of course and distance to the nearest existing corner of the public survey. The initial point of the survey of a reservoir should be fixed by reference of course and distance to the nearest existing corner outside the reservoir by a line which does not cross an area that will be covered with water when the reservoir is in use. The map, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4) should each show these connections.

13. When either terminal of a canal, ditch, or lateral is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than six miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the map, in the engineer's affidavit, and in the applicant's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given in the field notes.

14. When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized and which will fix and perpetuate the position of the terminal point. The map must show the position of such marks and course and distance to the terminus. The field notes must give an accurate description of the mark and full data of the traverse as required above. The engineer's affidavit and applicant's certificate (Forms 3 and 4) must state the connections. These monuments are of great importance.

15 When a canal, ditch, or lateral lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately stated in the field notes and in Forms 3 and 4 by connections of termini, length, and width, as though each portion were independent. (See paragraphs 12, 13, and 14.)

16. When a reservoir lies partly on unsurveyed land, its initial point must be noted, as required for the termini of ditches in paragraph 12, and so that the reference line will not cross an area that will be covered with water when the reservoir is in use. The areas of the several parts lying on surveyed and unsurveyed land must be separately noted on the map, in the field notes, and in Forms 3 and 4.

17. Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same occurs, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys.

The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time limited in the act granting the right of way, which map, if in all respects regular when filed, will receive the Secretary's approval.

18. In filing such maps the initial and terminal points will be fixed as indicated in paragraphs 13 and 14.

19. Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. In the case of a reservoir the distance must not be measured across an area which will be covered with water when the reservoir is in use, and permanent monuments must be set on the water line of the reservoir at the intersection of these lines of public survey. The map of the canal, ditch, or reservoir must show these distances and marks, and the field notes must give the points of intersection and the distances, and describe the marks. When corners are destroyed by the canal or reservoir, proceed as directed in paragraphs 22 and 23.

20. The map must bear a statement of the width of each canal, ditch, or lateral at high-water line. If not of uniform width, the limits of the deviations from it must be clearly defined on the map. The field notes should record the changes in such a manner as to admit of exact location on the ground. The map must show the source of water supply.

21. In applications for right of way for a reservoir the capacity of the reservoir must be stated on the map in acre-feet (i. e., the number of acres that will be covered 1 foot in depth by the water it will hold; 1 acre-foot is 43,560 cubic feet). The map must show the source of water supply for the reservoir and the location and height of the dam.

22. Whenever a corner of the public survey will be covered by earth or water, or otherwise rendered useless, marked monuments (one on each side of destroyed corner) must be set on each township or section line passing through, or one on each line terminating at, said corner. These monuments must comply with the requirements for witness corners of the Manual of Surveying Instructions issued by this office (p. 47, ed. 1894), and must be at such distance from the works as to be safe from interference during the construction and operation of the same. In the case of reservoirs these monuments are additional to those required in paragraph 19. In case two or more consecutive corners on the same line are destroyed, the monument shall be set as required in the Manual for the nearest corner on that line to be covered.

23. The line on which such monument is set will be determined by running a random line from the corner to be destroyed to the first existing corner on the line to be marked by the monument, setting on the random line a temporary mark at the distance of the proposed monument. If the random line strikes the corner run to, the monument will be established at the place marked; if the random line passes to one side of the corner, the north and south or east and west distance to it

will be measured and the true course calculated. The proper correction of the temporary mark will then be computed and a permanent monument set in the proper place. The field notes for the surveys establishing the monuments must be in duplicate and separate from those of the canal or reservoir, being certified by the surveyor under oath. They must comply with the form of field notes prescribed in the Manual of Surveying Instructions issued by this office. When application is made for a canal or reservoir which is constructed and in operation, the method to be adopted in setting the monuments, being governed by the special features of each case, must be left to the judgment of the surveyor. No field notes will be accepted unless the lines on which the monuments are set conform to the lines shown by the field notes of the survey as made originally under the direction of this office, and unless the notes are in such form that the computation can be verified and the lines retraced on the ground.

24. The engineer's affidavit and applicant's certificate must both designate by termini (as in paragraphs 12 to 18, inclusive) and length each canal, ditch or lateral, and by initial point and area each reservoir shown on the map, for which right of way is asked. This affidavit and this certificate (changed where necessary when an application is made by an individual or association of individuals) must be written on the map in duplicate. Applicants under the act of March 3, 1891, must include in the certificate (Form 4) the statement: "And I further certify that the right of way herein described is desired for the main purpose of irrigation," or "for public purposes," as the case may be. If for public purposes, the applicant should submit a separate statement of the nature of the proposed use. (See Forms 3 and 4, page 213.) No changes or additions are allowable in the substance of these forms, except when the facts differ from those assumed therein.

25. When the maps are filed the local officers will note in pencil on the tract books opposite each vacant tract traversed, that right of way for a canal (or reservoir) is pending, giving date of filing and name of applicant, noting on each map the date of filing, over their written signature, transmitting them promptly to the General Land Office. (See paragraph 11.)

26. Upon the approval of a map of location by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the canals, ditches, or reservoirs, as laid down on the map. They will also note, in ink, on the tract books, opposite each tract marked as required by paragraph 25, that the same is to be disposed of subject to the right of way for the canal, ditch, or reservoir.

27. When the canal, ditch, or reservoir is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6) must be filed in the local office, in duplicate, for transmission to this office. In case of deviations from the map previously approved, whether before or

after construction, there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case; and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment under seal of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the honorable Secretary.

28. The act approved February 26, 1897 (29 Stat., 599), entitled "An act to provide for the use and occupation of reservoir sites reserved," permits the approval of applications under the above act of 1891 for right of way upon reservoir sites reserved under authority of the acts of October 2, 1888 (25 Stat., 505, 526), and August 30, 1890 (26 Stat., 371, 391). The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That the charges for water coming in whole or in part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

When an application is made under this act a reference to it should be added to Forms 4 and 6. In other respects the application should be prepared according to the preceding regulations.

OIL PIPE LINES.

29. The act approved May 21, 1896 (29 Stat., 127), entitled "An act to grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming," is similar in its requirements to the right of way act of March 3, 1891, and the preceding regulations furnish full information as to the preparation of the maps and papers. Applicants will be governed thereby so far as they are applicable.

The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States situate in the State of Colorado and in the State of Wyoming outside of the boundary lines of the Yellowstone National Park is hereby granted to any pipe line company or corporation formed for the purpose of transporting oils, crude or refined, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by said pipe line and twenty-five feet on each side of the center line of the same; also the right to take from the public lands adjacent to the line of said pipe line material, earth, and stone necessary for the construction of said pipe line.

SEC. 2. That any company or corporation desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of the pipe line, if the

same be upon surveyed lands and if the same be upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its line, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

SEC. 3. That if any section of said pipe line shall not be completed within five years after the location of said section the right herein granted shall be forfeited, as to any incomplete section of said pipe line, to the extent that the same is not completed at the date of the forfeiture.

SEC. 4. That nothing in this act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care.

RESERVOIRS FOR WATERING STOCK.

30. The act approved January 13, 1897 (29 Stat., 484), entitled "An act providing for the location and purchase of public lands for reservoir sites," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided*, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

SEC. 2. That any person, live-stock company, or corporation desiring to avail themselves of the provisions of this act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

SEC. 3. That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

SEC. 4. That Congress may at any time amend, alter, or repeal this act.

31. Although the title indicates that lands are to be sold for reservoir sites, the act does not provide for the sale of any lands, and therefore no lands can be sold under its provisions. The act, however, directs the Secretary of the Interior to reserve the lands from sale after the approval of the map showing the location of the reservoir.

32. Any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock, in

order to obtain the benefits of the act must file a declaratory statement in the United States land office in the district where the land is located.

33. When the applicant is a corporation it should file also a copy of its articles of incorporation and proofs of its organization, as required in paragraph 5, subdivisions 1, 2, 3, 4, 5, 6, and 11.

34. The declaratory statement must be under oath, and should be drawn in accordance with Form 9 (see page 18), and must contain the following statements:

First. The county in which the reservoir is to be or has been constructed; the description, by the smallest legal subdivisions, 40-acre tracts or lots, of the land to be reserved for the reservoir, including also the land necessary for the use thereof; that to the best of the applicant's knowledge and belief the land is not mineral or otherwise reserved; and the business of the applicant. The total of land to be used must not exceed 160 acres.

Second. The location of the reservoir, described by the smallest legal subdivisions, 40-acre tracts or lots; its area in acres; its capacity in gallons; and the height of the dam.

Third. The number, location, and area of all other reservoir sites filed upon by the applicant, designating those located in the same county.

35. Upon the filing of such declaratory statement there will be noted thereon the date of filing over the signature of the officer receiving it, and the statements will be numbered in regular order, beginning with No. 1. The register will make the usual notations on the records, in pencil, under the designation of "Reservoir Declaratory Statement, No. —," adding the date of the act. The local officers will be authorized to charge the usual fees (sec. 2238, U. S. Rev. Stat.). The declaratory statement will be forwarded with the regular monthly returns, with abstracts, in the usual manner.

36. The reservoir, if not completed at the date of the act, shall be completed and constructed within two years after the filing of the declaratory statement, otherwise the declaratory statement will be subject to cancellation.

37. After the construction and completion of the reservoir the applicant shall have the same, including the lands necessary for the proper use and enjoyment thereof, not exceeding 160 acres, accurately surveyed and mapped, in accordance with the instructions of paragraphs 8 to 25, inclusive, so far as they are applicable. The map and field notes must be prepared in duplicate and must be filed in the proper local office. The map must bear forms 5 and 6 (page 17) modified as required by the circumstances, and the field notes must be sworn to by the surveyor.

38. When the map, field notes, and other papers have been filed in the local office the date of filing will be noted thereon and the proper

notations will be made on the local office records, as in the case of the declaratory statement. The maps and papers will then be promptly forwarded to this office.

39. The maps and papers will be examined by this office as to their compliance with the law and the regulations; and to determine whether the amount of land desired is warranted by the showing made in the application. If found satisfactory they will be submitted to the honorable Secretary, and upon his approval the lands shown to be necessary for the proper use and enjoyment of the reservoir will be reserved from other disposition so long as the reservoir is maintained and water kept therein for the purposes named in the act.

40. Upon the receipt of notice of such reservation from this office the local officers will make the proper notations on their records and report the making thereof promptly to this office.

41. In order that this reservation shall be continued it is necessary that the reservoir "shall be kept in repair and water kept therein." For this reason the owner of the reservoir will be required during the month of January of each year to file in the local office an affidavit to the effect that the reservoir has been kept in repair and water kept therein during the preceding year, and that all the provisions of the act have been complied with. Upon failure to file such affidavit, steps will be taken looking to the revocation of the reservation of the lands.

42. If the reservoir is located on unsurveyed land, the declaratory statement may be filed, the lands being described as closely as practicable.

43. The duty of this office in examining the maps and papers of all these applications is to ascertain whether the provisions of the acts of Congress are properly complied with; whether the proposed works are described in such a manner that the benefits to be granted under the various acts are defined so as to avoid future uncertainty; and whether the rights of other grantees of the Government are properly protected from interference. The above regulations are made for these purposes.

44. The widely different conditions to be considered in the operations proposed by the applicants make it impossible to formulate regulations that will furnish this office with the data necessary in all cases. This office will therefore call for additional information whenever necessary for the proper consideration of any particular case.

BINGER HERMANN, *Commissioner.*

Approved:

C. N. BLISS, *Secretary.*

Forms for "due proofs" and verification of maps of right of way for canals, ditches, and reservoirs.

FORM 1.

I, ——— ———, secretary (or president) of the ——— ——— Company, do hereby certify that the organization of said company has been completed; that the company

is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of ———, and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[Seal of company.] ——— ———.

—— *of the* ——— *Company.*

—

FORM 2.

STATE OF ———,

County of ———, *ss:*

——— ———, being duly sworn, says that he is the president of the ——— ——— Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

[Seal of company.] ——— ———,

President of the Company.

Sworn and subscribed to before me this —— day of ———, 18—.

[SEAL.] ——— ———,

Notary Public.

—

FORM 3.

STATE OF ———,

County of ——— *ss:*

——— ———, being duly sworn, says he is the chief engineer of (or the person employed to make the survey by) the ——— ——— Company; that the survey of said company's (canals, ditches, and reservoirs), described as follows: (Here describe each canal, ditch, lateral, and reservoir, for which right of way is asked, as required by paragraph 24, being a total length of canals, ditches, and laterals of ——— miles, and a total area of reservoirs of ——— acres), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company) and under its authority, commencing on the —— day of ———, 18—, and ending on the —— day of ———, 18—, and that the survey of the said (canals, ditches, laterals, and reservoirs) accurately represents (a proper grade line for the flow of water, and accurately represents a level line, which is the proposed water line of the said reservoir), and that such survey is accurately represented upon this map and by the accompanying field notes. And no lake, or lake bed, stream, or stream bed is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map.

——— ———,

——— ———.

Sworn and subscribed to before me this —— day of ———, 18—.

[SEAL.] ——— ———,

Notary Public.

—

FORM 4.

I, ——— ———, do hereby certify that I am president of the ——— ——— company; that ——— ———, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said (canals, ditches, laterals, and reservoirs), as accurately represented on this map and by the accompanying field notes, was made under authority

of the company; that the company is duly authorized by its articles of incorporation to construct the said (canals, ditches, laterals, and reservoirs) upon the location shown upon this map; that the said (canals, ditches, laterals, and reservoirs), as represented on this map and by said field notes, was adopted by the company, by resolution of its board of directors, on the —— day of ———, 18—, as the definite location of the said (canals, ditches, laterals, and reservoirs) described as follows—(describe as in Form 3)—and that no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of[1] (sections 18 to 21, inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes"); and I further certify that the right of way herein described is desired for the main purpose of irrigation.[2]

Attest: ——— ———,

President of the ——— Company.

[Seal of company.] ——— ———,

Secretary.

—

FORM 5.

STATE OF ——— ———,

County of ———, *ss:*

——— ———, being duly sworn, says that he is the chief engineer of (or was employed to construct) the (canals, ditches, laterals, and reservoirs) of the ——— company; that said (canals, ditches, laterals, and reservoirs) have been constructed under his supervision, as follows: (Describe as required in paragraph 24) a total length of constructed (canals, ditches, and laterals) of ——— miles, and a total area of constructed reservoirs of ——— acres; that construction was commenced on the —— day of ———, 18—, and completed on the —— day of ———, 18—; that the constructed (canals, ditches, laterals, and reservoirs), as aforesaid, conform to the map and field notes which received the approval of the Secretary of the Interior on the —— day of ———, 18—.

——— ———,

———.

Sworn and subscribed to before me this —— day of ———, 18—.

[SEAL.] ——— ———,

Notary Public.

—

FORM 6.

I, ——— ———, do hereby certify that I am the president of the ——— company, that the (canals, ditches, laterals, and reservoirs) described as follows (describe as in Form 5) were actually constructed as set forth in the accompanying affidavit of ——— ———, chief engineer (or the person employed by the company in the premises), and on the exact location represented on the map and by the field notes approved by the Secretary of the Interior, on the —— day of ———, 18—; and that the company has in all things complied with the requirements of the act of Congress[3] (March 3, 1891, granting right of way for canals, ditches, and reservoirs through the public lands of the United States.)

——— ———,

President of the ——— Company.

Attest:

[Seal of company.] ——— ———,

Secretary.

[1] Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891.

[2] Or "for public purposes," as the case may be.

[3] Here insert the description of the act of Congress under which the application is made, when filed under some other act than that of 1891.

Forms 7 and 8 of circular of March 21, 1892, adapted for use under act of May 14, 1896, as required by paragraph 6, circular of December 23, 1896.

FORM 7.

STATE OF ———,
County of ———, *ss:*

———— ————, being duly sworn, says he is the chief engineer (or the person employed by) the ——— company under whose supervision the survey was made of the grounds selected by the company for electrical purposes under the act of Congress approved May 14, 1896; said grounds being situated in the ——— quarter of section —— of township ——, of range ——, in the State (or Territory) of ———; that the accompanying plat accurately represents the surveyed limits and area of the grounds so selected, and that the area of the ground so selected and surveyed is —— acres and no more; that the company has occupied no other grounds for similar purposes upon public lands for the system represented hereon; and that, in his belief, the grounds so selected, surveyed, and represented, are actually and to their entire extent required by the company for the necessary uses contemplated by said act of Congress approved May 14, 1896 (29 Stat., 120).

———— ————,

———— ————.

Subscribed and sworn to before me this —— day of ———, 18—.

[SEAL.] ———— ————,

Notary Public.

—

FORM 8.

I, ———— ————, do hereby certify that I am the president of the ——— company; that the survey of the tract represented on the accompanying plat was made under authority and by direction of the company, and under the supervision of ———, its chief engineer (or the person employed in the premises), whose affidavit precedes this certificate; that the survey as represented on the accompanying plat actually represents the grounds required in the —— quarter section —— of township —— of range ——, for electrical purposes and to their entire extent, under the act of Congress approved May 14, 1896; that the company has selected no other grounds upon public lands for similar purposes, for the system represented hereon; and that the company by resolution of its board of directors, passed on the —— day of ———, 18—, directed the proper officers to present the said plat for the approval of the Secretary of the Interior, in order that the company may obtain the use of the grounds described under said act approved May 14, 1896 (29 Stat., 120).

———— ————,

President of the ——— Company.

Attest:

———— ————,

Secretary.

[Seal of Company.]

—

FORM 9.

Reservoir declaratory statement.

[Under act of January 13, 1897 (29 Stat., 484).]

RES. D. S. No. ——. } LAND OFFICE AT ———,
———, ——, 189—.

I, ———— ————, of ———, do hereby apply for the reservation of land in ——— County, State of ———, for the construction and use of a reservoir for furnishing water for live stock under the provisions of the act of January 13, 1897 (29 Stat.,

481). The location of said reservoir, and of the land necessary for its use, is as follows: ——— of section ——, in township —— of range —— M., containing ——— acres.

I hereby certify that to the best of my knowledge and belief the said land is not mineral, or otherwise reserved, and that the said reservoir is to be used in connection with the business of the applicant of ———.

The water of said reservoir will cover an area of ——— acres, in ——— of section ——, in township —— of range —— of said lands; the capacity of the reservoir will be ——— gallons, and the dam will be ——— feet high.

The applicant has filed no other declaratory statements under this act, except as follows:

No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres,
etc. etc. etc.

Total, ——— acres, of which Nos. ——— are located in said county.

And I further certify that it is the *bona fide* purpose and intention of this applicant to construct and complete said reservoir and maintain the same in accordance with the provisions of said act of Congress and such regulations as are or may be prescribed thereunder.

——— ———.

STATE OF ———,
County of ———, *ss:*

——— ———, being duly sworn, deposes and says that the statements herein made are true to the best of his knowledge and belief.

——— ———.

Sworn to and subscribed before me this —— day of ———, in the year 189—.
[SEAL.] ——— ———,
Notary Public.

LAND OFFICE AT ———,
———, ——, 189—.

I, ——— ———, register of the land office, do hereby certify that the foregoing application is for the reservation of lands subject thereto under the provisions of the act of January 13, 1897, and that there is no prior valid adverse right to the same. ——— ———,
Register.

—

When the applicant is a corporation, Form 9 should be executed by its president under its seal, and attested by its secretary. It should begin as follows:

"I, ——— ———, do hereby certify that I am the president of the ——— company, and on behalf of said company and under its authority do hereby apply for the reservation of land," etc.

—

DESERT LAND ENTRY—REINSTATEMENT—EQUITABLE ACTION.

PATRICK H. QUEALY.

A desert land entry, canceled for failure to submit final proof within the statutory life of the entry, will not be reinstated with a view to equitable action, unless it appears that the land was reclaimed within the statutory period, or within a reasonable time thereafter, and sufficient cause for the delay is clearly shown.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 22, 1898.* (H. G.)

Patrick J. Quealy appeals from the decision of your office of October 14, 1896, refusing his application for the reinstatement of his desert

land entry, made June 16, 1887, for the SE. ¼ of the NE. ¼, the E. ½ of the SE. ¼, Sec. 21; the S. ½ of the NW. ¼ and the S. ½ of Sec. 22; the NW. ¼ of the NW. ¼ of Sec. 27; and the E. ½ of the NE. ¼, Sec. 28, T. 26 N., R. 81 W., in the Cheyenne, Wyoming, land district. The entry was canceled January 22, 1891, by your office for failure to make final proof within the period fixed by the statute then in force.

The affidavit accompanying the application is verified by the oath of the applicant and is supported by the general corroborative affidavits of two other parties. It shows substantially that the failure to make final proof within the statutory period was caused by a scarcity of water supply available for the irrigation of the lands during a series of years following the date of the entry, and that the applicant made no effort to reclaim the land during the time the entry was in force.

He further shows that the land is now fully reclaimed. About ten acres have been planted in alfalfa, which produces a crop annually, a portion of the tract produces hay, and the residue is used as pasturage, although it can be made to produce a valuable crop of hay. It is alleged that the irrigation of the soil has improved its condition, and that from five to six years before the application was made the water supply has increased in quantity, and in all ordinary seasons would be sufficient to fully reclaim the tract.

Upon this showing, notwithstanding more than five years had elapsed from the date of the cancellation of the entry and more than nine years from the date of the entry, the equitable discretion of the Department is invoked in order to secure a reinstatement of the entry for the purpose of making final proof. It does not appear in the application that there is no adverse claim to the tract or any portion thereof, but it is asserted in the brief of counsel that none exists and none is reported either by your office or the local office. In the absence of an adverse claim, under the circumstances of the case, the exercise of the equitable power of the Department is asked to reinstate the entry and to allow final proof thereon, and it is contended that its power has been frequently exercised in kindred cases. While there was no authority in the original desert land act for granting an extension of time to make final proof in desert land entries, it has been the practice of the Department to give an equitable consideration to final proof submitted shortly after the expiration of the statutory period, if the delay in making final proof was satisfactorily explained. (William S. Powell, 14 L. D., 493, 495, and cases there cited.) It appears from the application under consideration that the entryman would have been unable to make final proof during the time his entry was in force and for some time thereafter, as, owing to the scanty water supply during consecutive dry seasons, the entire tract was not reclaimed during the life of the entry.

The applicant does not attack the validity of the cancellation for lack of notice, and it is not contended that he made any answer to the

usual preliminary order to show cause why his entry should not have been canceled.

Under legislation amendatory of the original desert land act, subsequent to the cancellation of the entry, ownership by one person to a tract of desert land is restricted to three hundred and twenty acres. If the applicant's entry is restored, it would, in effect, be a new entry for six hundred and forty acres of land, and his application discloses that his final proof would show a complete reclamation of the tract only since the cancellation of the original entry.

No sufficient cause is shown for the delay in making this application, and the laches of the applicant is apparent from his own showing.

His entry appears to have been rightfully canceled, without protest, and when it is conceded he had not made complete reclamation of the land. The equitable power of the Department has been sparingly exercised, and only where the proof offered showed a compliance with the law as to reclamation within the statutory period or within a reasonable period thereafter, and where sufficient cause for the delay has been clearly shown.

The decision of your office denying the application is affirmed.

LOCATION AND ASSIGNMENT OF MILITARY BOUNTY-LAND WARRANTS.

CIRCULAR* TO REGISTERS AND RECEIVERS OF THE UNITED STATES LAND OFFICES.

DEPARTMENT OF THE INTERIOR,
General Land Office, February 18, 1896.

GENTLEMEN: Section 2414 of the Revised Statutes of the United States, which statutes embrace all laws, general and permanent in their nature, in force on the first day of December, 1873, provides that "All warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing, made and executed according to such form and persuant to such regulation as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant or location."

Under the authority conferred by the said section, the following *compilation* of rules and regulations governing the assignment of bounty-land warrants is prepared for the guidance of registers and receivers of district offices in ascertaining the title to such warrants, when the same are presented in payment of entries of public lands, and for the information of all concerned.

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* Not heretofore printed in the Land Decisions.

To avoid as far as possible complications of land titles arising in consequence of the location of fraudulent or imperfectly assigned warrants, registers and receivers *are peremptorily enjoined to refuse all warrants* presented when the assignments thereof do not accord in every *essential particular* with the rules herein prescribed; and in all cases *when the question of title is in doubt* they must decline to receive the warrants until the holders thereof have submitted the *same to this office* for examination, and have obtained a favorable decision thereon.

I.—OF ASSIGNMENTS.

1. No assignment of a warrant executed *prior to the date of the issue thereof* can be recognized by this office. (Revised Statutes, section 2436.)

2. The assignment is required to be *indorsed* as far as practicable upon the warrant transferred. Should it be found necessary in any case to write the entire assignment on a separate paper, *which can only occur when prior assignments have filled entirely the blank space on the warrant*, it must be *so* attached as to show unmistakably that the warrant assigned was in the hands of the party making the transfer. In such cases the signature of the assignor must be affixed in the presence of the officer before whom it is acknowledged, who must certify that at the date of the assignment the warrant was presented by and in possession of the assignor. (See Form No. 5.)

3. The same requirement must be observed in the preparation and acknowledgment of powers-of-attorney *to sell or locate* bounty-land warrants.

4. Blank assignments are *void*, and will not be recognized by this office. The name of an assignee should be written in the assignment before the warrant is sent to the *local or General* Land Office.

5. Each asssignment must be attested by *two subscribing witnesses;* the *mark* of a *witness* will not be respected.

6. Parties in interest as assignees are not recognized as legal attesting witnesses to an assignment; neither can an officer take an acknowledgement of an assignment to himself.

7. The execution of assignments is required to be *acknowledged* by the assignor in the presence of a register or receiver of a land office, a judge or clerk of a court of record when authorized to take acknowledgments, a notary public, justice of the peace, a commissioner of deeds resident in the State from which he derives his appointment, or a commissioner of a circuit court of the United States, who shall certify to the fact of the acknowledgment and to the identity of the assignor; and the *official seal* of said court, notary public, or commissioner shall be affixed to the certificate. When the acknowledgment is taken before a justice of the peace or other officer *without an official seal* (except a register or receiver of a land office), it must be accompanied by an additional certificate under seal of the proper authority, establishing

the *official character* of the person before whom the acknowledgment was made, and the *genuineness of his signature*. (See Form No. 15.)

Powers of attorney must be acknowledged in like manner.

8. Assignments executed by *unmarried females* must be accompanied by evidence that they have attained the age of twenty-one years; and when married women assign, their husbands must unite with them in making the transfer.

9. Assignments executed by a commissioner, or other designated person alleged to be acting under a decree of court, must be accompanied by a duly certified copy of such decree, in which all the proceedings had in the case should be recited, and from which it must appear that due notice of the pending suit had been given by publication or otherwise to all the parties interested.

10. Where *two* assignments exist, executed by the same party, but made in favor of different individuals, the person first named as assignee must execute a transfer in favor of the second grantee whether the assignment to him had been completed or not.

11. When the name of a person has been *inadvertently* inserted in an assignment of a warrant and *erased* therefrom, there should be filed an affidavit, duly authenticated, from such person, stating that his name had been *erroneously* written in said transfer, and erased with his *knowledge and consent*, and that he claims *no right or interest* in the warrant; when such person can not be found the title of the party whose name has been written over the erasure will not be respected by this office until the validity thereof has been satisfactorily affirmed by a court of competent jurisdiction. When the name of a *bona fide assignee* has been erased from a transfer an assignment from said assignee to the present holder of the warrant will be required to perfect the chain of title to the warrant.

12. When the assignment of a warrant is executed in a foreign country, and the acknowledgment thereof taken by an officer authorized by the laws thereof to perform such duties, the attestation of the American Consul in such country should be obtained as to the official character and genuineness of the signature of the person before whom the acknowledgement of the said assignment was made; or if the official character, etc., of such foreign magistrate is attested by a Consular Agent of such foreign government residing in this country, his official character must be certified by the diplomatic representatives of such government in the United States. When such assignments are executed in a foreign language duly authenticated translations thereof must be furnished. Secretaries of Legation and Consular Officers of the United States are authorized to take acknowledgments, but they must certify the same under their *official seals*.

13. When the persons named as warrantees are described in the warrant as being *minors*, their assignments thereof must be accompanied by satisfactory evidence that they had attained their majority at the date of the transfer.

14. When an assignment has been *executed* and *witnessed*, but not acknowledged, it may be proved in open court, but a certified transcript of the proceedings in the case must be attached to the warrant; when, however, such assignment has not been *properly attested*, it must be made *anew*.

15. When an assignment is made by an Indian residing among the whites the prescribed form will be adopted with this single addition, that the officer taking the acknowledgment shall certify that the Indian is capable of contracting, also the amount paid to him for the warrant, and that he saw the same paid to the Indian.

16. Where it is made by an Indian holding tribal relations, his identity and ability to contract must be certified by the Superintendent of Indian Affairs or Indian Agent, either of his own knowledge or on the testimony of the chiefs certifying to the amount paid for said warrant; that the same was paid in his presence, and that the transaction was fair and regular. In either case, if the amount paid is not a fair consideration, the assignment will be disregarded.

17. Where a warrant for the services of an Indian is issued or descends to minors who no longer retain their tribal relations, it must be located or sold by a guardian duly appointed and authorized by the proper court for that purpose.

Where the minor or minors retain their tribal relations, the Agent or Superintendent must certify that they are entitled to the warrant under the laws, usages, and customs of the tribe; and when sold or located, that it was done by the guardian or such proper representative as according to said laws, usages, and customs was fully authorized.

In all cases where the signature of Superintendent or Indian Agent is herein required the genuineness of the signature of that officer must be attested by the Commissioner of Indian Affairs.

18. Prior to June 3, 1858, military land warrants were regarded as *real estate;* consequently a transfer of such warrant before that date by an *administrator* must be accompanied by evidence that the same was made in pursuance of an order of the court for the sale of the real estate of the decedent.

But by the act of June 3, 1858, which was reenacted by section 2414 of the Revised Statutes, bounty-land warrants were declared to be *personal chattels*, and as such to be assignable by the warrantees, by their widows in certain cases, by their heirs or devisees, or by the *legal representatives* of the deceased claimant "for the use of the heirs or legatees only."

It follows that the right to assign enures to the assignees of the vendors named above, and to their heirs, devisees, or legal representatives; but these latter are *not* required to assign "for the use of the heirs only."

19. Where a warrant has been issued in the name of a deceased soldier who had applied therefor before his death, the title thereto is

declared by the said section 2444, Revised Statutes, to vest in the *widow* if there be one, and if there be no widow then in the *heirs or legatees* of the claimant.

20. If the claimant died and left a widow, who also was deceased before the issue of the warrant, then the title thereto vests in the heirs or legatees of the warrantee.

21. To make a warrant issued in the name of a deceased person available it should be accompanied by a certificate under seal from the proper court having probate jurisdiction, showing the fact of the death of the warrantee at a *specified date*, and stating whether he left a *widow*, giving her name if there was one. If there was no widow the said certificate should state whether the warrantee died testate or intestate, and give the names of all his heirs at law, specifying such as are *adults* and such as are *minors*.

22. If it shall appear from such certificate that the warrantee died *before* the issue of the warrant and left a *widow*, the assignment of such widow, *her* heirs or legal representatives, will be regarded as a sufficient conveyance of the title to the warrant.

23. If the warrantee died *after* the issue of the warrant, or if he died *before* such issue and left no *widow*, the title vests in his heirs at law or legatees.

24. If he died *intestate* his heirs, shown to be such by the required certificate of court, may assign the warrant, the adults for themselves and the minors by their guardians, who shall file with the warrant a certified copy of their letters of guardianship or a certificate from the clerk of the proper court stating that such letters had been issued and that they were in force at the date of the assignment.

Or the administrator of the estate of the *deceased warrantee* who died intestate may assign the warrant "*for the use of the heirs only*," upon filing therewith a certified transcript of the letters of administration, or a certificate from the clerk of the proper court that the said letters had been issued and that they were in force at the date of the assignment. (See Form No. 6.)

25. If the warrantee died *testate* a certified transcript of the will must accompany the warrant. If the will *specifically* disposes of the warrant the devisee or devisees may assign if adults in the usual form; if minors, by their guardians as aforesaid. If the will does not *specifically* dispose of the warrant, the executor of the estate of the warrantee may assign "*for the use of the heirs or legatees only;*" but in that case a certified transcript of the letters testamentary, or a certificate from the proper authority that such letters had been granted and were in force at the date of the assignment, must accompany the transfer. (See Form No. 8.)

26. An assignment executed by an *administrator de bonis non with the will annexed* of the estate of the deceased warrantee must be prepared in accordance with the Form No. 8 prescribed to be used by an

executor, and accompanied by evidence of his authority to act as required in the case of an administrator of the estate of a warrantee who died intestate.

II.—AS TO LOCATIONS.

27. Military bounty-land warrants may be located upon any vacant public lands of the United States that are subject to sale at *private entry*, and they may be used in payment of preemption claims, or in commutation of homestead entries even when the same embrace *unoffered lands*.

28. A warrant issued to several parties or assigned to three or more persons can not be located if assigned by one of the owners to another, or to other persons so as to invest any one of the parties with a greater interest than any other. In other words each owner of a warrant at the time of its location must have an *equal* share of interest therein.

29. A warrant may be located either at a district land office or through the agency of this office.—(Revised Statutes, section 2437.) If located at a district office it must be accompanied by a tender of the fees to which the register and receiver are entitled, and by a written application to locate containing a description of the tracts desired and signed by the locator or his attorney in fact. If by the latter his authority to act must be evidenced by a power of attorney, which must be prepared in accordance with Form No. 14, and indorsed if practicable upon the warrant. (See rule No. 2.)

30. If the location is made through *this office* the warrant must be sent to the Commissioner with a request that the same be located in a specified land district, and accompanied by a receipt from the register and receiver for the fees to which they may be severally entitled under section 2238, Revised Statutes.

31. Each warrant is required to be distinctly and separately located upon a *compact* body of land; and if the area of the tract claimed should exceed the number of acres called for in the warrant the locator must pay for the excess in cash; but if it should fall short he must take the tract in full satisfaction for his warrant. A person can not enter a *body of land* with a number of warrants without specifying the particular tract or tracts to which each shall be applied; and for each warrant there must be a distinct location, certificate, and patent.

32. Where the desired tract is subject to entry at a greater minimum than $1.25 per acre the locator, in addition to the surrendered warrant, must pay in cash the difference between the value of such warrant at $1.25 per acre and that of the said land; or present a warrant of such denomination as will at its legal value of $1.25 per acre cover the rated price of the tract, and pay the excess in value of the land if any in cash. For example: A tract of 40 acres of land held at $2.50 per acre may be entered by the location of a warrant calling for 40 acres and the payment of $50 in cash; or by locating thereon a warrant for 80 acres, the 40 acres embraced in the entry being received in full sat-

isfaction of the same; or a tract containing 80 acres rated at $2.50 per acre may be entered by the location of *two* eighty-acre warrants, or of *one* for one hundred and sixty acres, and so on. It will be required, however, in the entry of a tract held at a greater minimum than $1.25 per acre by the location of *two or more* warrants, that *each warrant* shall be located upon a *specific legal subdivision thereof*, which legal subdivision shall be received in full satisfaction of the warrant surrendered therefor; and that the excess in value of the lands, if any there be, shall in each case be paid in cash. Hence, a tract containing 40 acres or less of double minimum lands can not be entered by the location of *two forty-acre warrants.*

33. A preemptor of lands held at $1.25 per acre may enter the tract embraced in his claim by the location of one, two, or more warrants; but each warrant must be applied to a specific subdivision thereof; that is, a warrant for 40 acres must be located upon a described subdivision containing as nearly as possible 40 acres of land; a warrant for 80 acres upon a tract embracing 80 acres, and so on. Where the preemption claim is composed of lands subject to entry at a greater minimum than $1.25 per acre the rules set forth in the preceding section will apply.

34. When a subdivision is fractional a warrant approximating nearest the number of acres embraced therein may be located thereon, but the fractional excess in area must be paid for with cash, and will be conveyed in the same patent with the lands covered by the location of the warrant; a *legal subdivision*, however, other than those entered by the location of the warrant, will not be regarded as a legitimate fractional excess over such location, but will be required to constitute a *separate entry.* Thus, a person will not be permitted to make *one entry* of a quarter section of land by the location of a warrant for 120 acres and a cash payment for the remaining subdivision.

35. Registers and receivers of the local land offices are entitled to the following fees for their services in locating warrants, and the several amounts mentioned must be paid *at the time of location.*

For a 40-acre warrant, $0.50 each to the register and receiver; total, $1.00.
For a 60-acre warrant, $0.75 each to the register and receiver; total, $1.50.
For an 80-acre warrant, $1.00 each to the register and receiver; total, $2.00.
For a 120-acre warrant, $1.50 each to the register and receiver; total, $3.00.
For a 160-acre warrant, $2.00 each to the register and receiver; total, $4.00.

36. In all cases the patent will be transmitted to the local office where the location was made for delivery by the register, unless the duplicate certificate of location shall have been previously filed in this office with a request that the patent be delivered as requested by the person sending the same; and in no case will the patent be delivered, either by this or the local land office, unless upon receipt of the duplicate certificate of location, or of an affidavit of ownership of the lands conveyed by the patent, and of the loss or destruction of the said duplicate certificate.

III.—MISCELLANEOUS PROVISIONS.

37. Bounty-land warrants for military services granted under general land laws are issued only by the *Commissioner of Pensions;* and persons supposing themselves entitled to such warrants should address their applications therefor to that officer.

38. Neither bounty-land warrants nor the lands entered therewith are liable to be sold or made subject to the payment of any debt or claim incurred *by the warrantees*, until after the issue of the patent.—(Revised Statutes, section 2436.)

39. Warrants that may have been *reissued* under the provisions of Revised Statutes, section 2441, are subject to the same rules respecting assignments that apply to original warrants; but in default of an assignment from the warrantee a decree of title must be obtained from a court of competent jurisdiction, and a transcript thereof appended to the reissued warrant.

40. When an entry made by the location of a warrant *properly assigned to the locator* has been canceled, the warrant will be returned, with a certificate attached thereto authorizing its *relocation* by the said locator or his assignees without a further payment of location fees. In no case, however, will such a certificate be attached to a warrant the assignments whereof are not such as would receive the approval of this office if presented for that purpose.

41. When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon, the parties in interest may procure the issue of a patent by filing in the office for the district in which the lands are situate an acceptable substitute for the said warrant. The substitution must be made in the name of *the original locator*, and may consist of a *warrant, cash, or any kind of scrip legally applicable* to the class of lands embraced in the entry. *Two* warrants can not be substituted for *one* originally located, nor will any payment be received that would destroy *the identity* of the entry.

If a certificate of approval should be attached to the warrant, a blank form of assignment will accompany the same, which may be used in making a subsequent transfer.

IV.—ACT OF DECEMBER 13, 1894.

42. The receivability of military bounty-land warrants as a consideration for public lands is affected by the act of Congress, approved December 13, 1894, entitled "An Act to provide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section three of the Act approved June second, eighteen hundred and fifty-eight."

Under previously existing laws, the said military bounty-land warrants were locatable on any land subject to sale at ordinary private entry, and also in payment of preemption claims or in commutation of

homestead entries, even where the same embraced unoffered lands which, being unoffered, were, therefore, not subject to private entry.

The act of December 13, 1894, "in addition to the benefits now given thereto by law," provides that said warrants may be located in certain other classes therein specified, viz:

In the payment, or part payment, for any lands entered under the desert-land law of March 3, 1877, and the amendments thereto; in payment, or part payment, for lands entered under the timber-culture law of March 3, 1873, and the amendments thereto; in payment, or part payment, for lands under the timber and stone law of June 3, 1878, and the amendments thereto, and in payment, or part payment, for lands sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

This act does not change existing law or regulations as to the location of such warrants upon lands subject to sale at private entry, or in payment for preemption claims or commutation of homestead entries, but in such cases the instructions in paragraphs 27 to 35 above will still apply.

In reference to the four classes of entries specified in the act of December 13, 1894, you are advised that one or more warrants are receivable in payment, or part payment, for a tract of land entered under either of the laws designated, at the rate of $1.25 per acre upon the expressed value of the warrants or certificates of location. If the amount of money due on such entry exceeds the face value of the warrant at the rate of $1.25 per acre, the entryman must pay for the excess in cash, but if the face value of the warrant exceeds the amount due on such entry, the claimant must take the tract in full satisfaction of said warrant.

As a basis for patent you will issue the regular receipt and certificate in each class of entry, viz: in desert-land entries, Forms 4–143 and 4–200, and in the other classes designated, Form 4–131 and 4–189, noting thereon the manner of payment.

In initiating an entry under the desert land laws, payment may be made in money to the amount of twenty-five cents per acre, as required by previously existing law, or if preferred, warrants may be tendered as payment, and if the face value of such warrant exceeds the amount of money due in initiating said entry, credit may be given for any balance to be applied to final payment when final proof has been made. In this event you will make such notes on your records as will indicate such credit, giving the number and acreage of the warrant used, and in issuing final papers refer thereon to such credit, collecting any balance due in cash, warrants, or scrip. A notation should also be made on your joint certificate (Form 4–199) as to such location and credit.

Where such warrants are tendered as payment by other than the party to whom issued, you will require evidence that the entryman is the heir or legatee of the party to whom issued, or see that said war-

rant has been duly assigned in accordance with regulations above given in paragraphs Nos. 1 to 26.

No fees are required to be paid where warrants are used under this act, the same being regarded as the equivalent for money to the extent of their value at the rate of $1.25 per acre, and the local officers will receive from the United States Treasury their commissions upon the surrender thereof as in the case of entries made with actual cash.

When located, each warrant must be relinquished by the legal owner thereof after the following form, viz:

I (or we) do hereby relinquish to the United States the within military bounty-land warrant in payment (or in part payment as the case may be) of the (here describe the tract), located in the name of ———, at the land office at ———, this —— day of ———, 189—.

Witnesses: C D.
E F. (Signed) A B. [SEAL.]

In their monthly abstracts the register and receiver will designate the entries in which warrants are used in payment, and will show the balance, if any, paid in cash. The receiver in his monthly account current will debit the United States with the amount of such warrants, and in his quarterly accounts will specify each entry in which such warrants are used in payment, giving the number and acreage of the warrant and date of the act under which issued and the amount for which they are received, and debit the United States with the same.

Such warrants received in payment for lands sold must be forwarded to this office with your monthly account current for the month in which they are received, and must be designated in the receiver's letter of transmittal by number and acreage of each warrant, date of the act under which issued, amount for which received, and the register's and receiver's number of the entry in each case.

It may also be added that, under said act, no warrant can be used in payment for any lands which have been purchased from any Indian tribe within ten years last past, neither can warrants be used in payment for lands ceded to the United States by any Indian tribe where such lands are to be disposed of for the benefit of such Indian tribe.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

February 18, 1896.
Approved:
HOKE SMITH, *Secretary.*

—

FORM NO. 1.

For the assignment of a warrant by the warrantee.

For value received I, A B, to whom the within warrant No. —— was issued, do hereby sell and assign unto C D of ——— county, ———, and to his heirs and assigns forever, the said warrant, and authorize him to locate the same and receive a patent therefor.

Witness my hand and seal this —— day of ———, 18—.

A B. [SEAL.]

Attest:
E F.
G H.

(See rules Nos. 2 and 5.)

FORM NO. 2.

Of acknowledgment where the vendor is known to the officer taking the same.

STATE OF ———, }
——— *County,* } *ss:*

On this —— day of ———, 18—, before me personally came A B, to me well known, and acknowledged the foregoing assignment to be his act and deed, and I certify that the said A B is the identical person to whom the within warrant issued, and who executed the foregoing assignment thereof.

(See rule No. 7.)

[Officer's Signature.]

FORM NO. 3.

Of acknowledgment where the vendor is not known to the officer and his identity has to be proved.

STATE OF ———, }
——— *County,* } *ss:*

On this —— day of ———, 18—, before me personally came A B and E F of the County of ———, in the State of ———, and the said E F, being well known to me as a credible and disinterested person, was duly sworn by me, and on his oath declared and said that he well knows the said A B, and that he is the same person to whom the within warrant issued, and who executed the foregoing assignment; and his testimony being satisfactory evidence to me of that fact the said A B thereupon acknowledged the said assignment to be his act and deed.

[Officer's Signature.]

FORM NO. 4.

For the assignment of a warrant by the assignee.

For value received I, C D, to whom the within warrant, No. ——, was assigned, do hereby sell and assign unto E F, of ——— county, ———, and to his heirs and assigns forever, the said warrant, and authorize him to locate the same and receive a patent therefor.

Witness my hand and seal this —— day of ———, 18—.

C D. [SEAL.]

Attest:
G H.
I J.

(See rules Nos. 2 and 3.)

FORM NO. 5.

For the certificate of acknowledgment of an assignment when the same is written on a separate paper and attached to the warrant.

STATE OF ———, }
——— *County,* } *ss:*

On the —— day of ———, 18—, before me personally came ——, to me well known, and acknowledged the foregoing assignment to be —— —— act and deed, and in my presence this day subscribed —— name thereto; and I certify that the said ——— is the identical person to whom the annexed warrant No. —— was assigned, and that

the said warrant at the time of making the foregoing assignment was presented by and in the possession of him, the said ———.

———. [SEAL.]

(See rules Nos. 2 and 7.)

FORM NO. 6.

For the assignment of a warrant by an administrator.

For value received, I, A B, administrator of the estate of C D, deceased, who died intestate, to whom the within warrant No. —— was issued, do hereby sell and assign, "for the use of the heirs only," unto E F of ——— county, ———, and to his heirs and assigns forever, the said warrant, and to authorize him to locate the same and receive a patent therefor.

Witness my hand and seal this —— day of ———, 18—.

A B, [SEAL.]
Administrator.

Attest:

G H.
I J.

(See rule No. 24.)

NOTE.—A certified copy of the letters of administration must accompany this assignment, or a certificate filed from the clerk of the proper court that said letters had been duly issued and *were in force at the date of the assignment.*

If the *date* of the death of the warrantee is not stated in the letters of administration, or other evidence as above mentioned, the same *must* appear in the *clerk's certificate* appended thereto.

FORM NO. 7.

For the acknowledgment.

STATE OF ———, } *ss:*
——— *County,* }

On this —— day of ——, 18—, before me personally came ———, to me well known, and acknowledged the foregoing assignment to be —— act and deed, and in my presence subscribed —— name thereto: and I certify that the said —— is administrator of the estate of the warrantee ——, deceased, to whom the within warrant No. —— was issued, and who executed the foregoing assignment thereof.

Witness my hand and official seal the day and year above written.

[Officer's signature.]

NOTE.—In assignments made by an administrator of the estate of a deceased *assignee* the words "*for the use of the heirs only*" may be omitted, but in all other respects the foregoing form of assignment and acknowledgment will be required.

FORM NO. 8.

For the assignment of a warrant by an executor.

For value received, I, A B, executor of the estate of C D, deceased, who died testate, to whom the within warrant No. —— was issued, do hereby sell and assign ("*for the use of the heirs only*," or "*for the use of the legatees as mentioned in the will*," as the case may be) unto E F of ——— county, State of ———, and to his heirs and assigns forever,

the said warrant, and authorize him to locate the same and receive a patent therefor.

Witness my hand and seal this —— day of ———, 189—.

A B, [SEAL.]
Executor.

Attest:
G H.
I J.

(See rule No. 25.)

NOTE.—A certified copy of the *will*, and also of the *letters testamentary* or other proper evidence under the seal of said court showing that said executor was duly appointed and authorized to act as such *at the date of said assignment*, must accompany the same.

If the date of the death of the warrantee is not stated in the *letters testamentary or other* evidence, as above mentioned, it must appear in the *certificate of the clerk* appended thereto, as taken from the records of said court. The certificate of the acknowledgment may be the same as in Form No. 7, except that the word "*executor*" must be used instead of "*administrator*."

FORM NO. 9.

For the assignment and acknowledgment of a warrant by the heirs at law of a deceased warrantee.

For value received, we, A B, C D, and E F, the only heirs at law of G H, deceased, to whom the within warrant No. —— was issued, do sell and assign unto I J, of ——— county, State of ———, and to his heirs and assigns forever, the said warrant, and authorize him to locate the same and receive a patent therefor.

Witness our hands and seals this —— day of ———, 18—.

——— ———. [SEAL.]
Attest: ——— ———. [SEAL.]
K L. ——— ———. [SEAL.]
M N.

(See rule No. 24.)

FORM NO. 10.

For the acknowledgment.

STATE OF ———, } *ss:*
———*County*, }

On this —— day of ———, 18—, before me personally came A B, C D, and E F, to me well known, and acknowledged the foregoing assignment to be their act and deed, and I certify that the said A B, C D, and E F are the identical persons named in the attached certificate * as the only heirs at law of said warrantee, deceased, and who executed the foregoing assignment thereof.

Witness my hand and official seal the day and year above written.

[Officer's signature.]

* For the evidence of the *death and heirship* above mentioned, it will be necessary to procure and attach a certificate under seal from a *court* having probate jurisdiction showing that it has been proved to the satisfaction of said *court*, in *open* court, that said warrantee E H is dead, the *date* of his *death*, whether he died testate or intestate; whether or not he left a *widow*, and who are his heirs and *only* heirs at law, with their respective ages. If any of such heirs are *feme coverts* their husbands must join in the assignment. ☞ This rule will apply to *all* assignments made by married women.

FORM NO. 11.

For the assignment of a warrant by a guardian.

For value received, I, A B, guardian of the person and estate of C D, a minor warrantee to whom the within warrant No. —— was issued (or "*a minor heir at law, as mentioned in the attached certificate*—see the note following *Form No. 10*), do hereby sell and assign, *for the benefit of said minor*, unto E F, of the county of ———, State of ———, and to his heirs and assigns forever, the said warrant, and authorize him to locate the same and receive a patent therefor.

Witness my hand and seal this —— day of ———, 18—.

——— ———, [SEAL.]
Guardian.

Attest:
G H.
I J.

(See rule No. 24.)

FORM NO. 12.

For the acknowledgment.

STATE OF ———, }
——— *County*, } *ss:*

On this —— day of ———, 18—, before me personally came ——— ———, to me well known, and acknowledged the foregoing assignment to be his act and deed, and in my presence subscribed his name thereto, and I certify that the said —— —— is guardian of the person and estate of said minor, and who executed the foregoing assignment thereof.

Witness my hand and official seal the day and year above written.

[Officer's signature.]

NOTE.—A certified copy of the letters of guardianship, or other legal evidence under the seal of the proper probate *court* showing that the said guardian was duly appointed and authorized to act as such *at the date of said assignment*, must accompany the same.

FORM NO. 13.

Of a power of attorney to sell a warrant.

Know all men by these presents, that I (*here insert the name of the warrantee or owner of the warrant*), of the county of ———, in the State of ———, do hereby constitute and appoint —— —— of the county of ———, in the State of ———, my true and lawful attorney, for me and in my name, to sell and convey the within land warrant No. —— for ——— acres, issued under the act of ———, 18—.

Witness my hand and seal this —— day of ———, 18—.

[Warrantee's or owner's signature.] [SEAL.]

Signed in the presence of—
A B.
C D.

(See rules Nos. 2 and 3.)

NOTE.—The form of acknowledgment of a power of attorney must be the same as for the sale of the warrant, and both must be indorsed upon the warrant if there is sufficient blank space thereon that can be used for that purpose; otherwise, it must be certified to as in the certificate of acknowledgment stated in Form No. 5.

FORM No. 14.

For a power of attorney to locate a warrant.

Know all men by these presents, that I (*here insert the name of the warrantee or assignee*), of the county of ———, in the State of ———, do hereby constitute and appoint A B of the county of ———, in the State of ———, my true and lawful attorney, for me and in my name, to locate land warrant No. —— for ——— acres of land, which issued under the act of ———, 18—.

Witness my hand and seal this —— day of ———, 18—.

[Warrantee's or assignee's name.] [SEAL.]

Signed in presence of—
C D.
E F.

(See rules Nos. 2, 3, and 29.)

FORM No. 15.

Of the certificate of the clerk of the court, judge, or other person who is authorized to certify under seal to the official character of the officer who takes acknowledgments of assignments.

STATE OF ———, }
——— *County*, } *ss:*

I, A B, clerk of the court ———, in the county and State aforesaid, hereby certify that John Jones, whose genuine signature is affixed to the above acknowledgment, was, at the time of assigning the same, a justice of the peace (*notary public or other officer*), duly authorized by law to take such acknowledgment, and that full faith and credit are due to all his official acts as such.

Given under my hand and the seal of said court this —— day of ———, 18—.

A B, *Clerk*. [SEAL.]

(See rule No. 7.)

NOTE.—Where any acknowledgment is taken before a clerk of a court, judge, notary public, or other officer duly authorized by law, with their respective *official seals* affixed, the above certificate will not be required. Nor is such certificate required when the acknowledgment is taken before a register or receiver of a United States land office.

The following sections of the Revised Statutes of the United States refer to the assignment of military bounty-land warrants and locations made therewith; and to the application of such warrants to the location of public lands, viz:

Military bounty-land warrants and locations assignable.

22 March, 1852, c. 19, s. 1, v. 10, p. 3.
3 June, 1858, c. 84, s. 2, v. 11, p. 309.

"SEC. 2414. All warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owner of the warrant or location.

Warrants located at $1.25; excess paid in cash.

22 March, 1852, c. 19, s. 1, v. 10, p. 3.

"SEC. 2415. The warrants which have been or may hereafter be issued in pursuance of law may be located according to the legal subdivisions of the public lands in one body upon any lands of the United States subject to private entry at the time of such location at the minimum price. When such warrant is located on lands which are subject to entry at a greater minimum than one dollar and twenty-five cents per acre, the locator shall pay to the United States in cash the difference between the value of such warrants at one dollar and twenty-five cents per acre and the tract of land located on. But where such tract is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

Death of claimant after establishing right and before issuing of warrant.

3 June, 1858, c. 84, s. 1, v. 11, p. 308.

"SEC. 2444. When proof has been or hereafter is filed in the Pension Office, during the lifetime of a claimant, establishing, to the satisfaction of that office, his right to a warrant for military services, and such warrant has not been, or may not be, issued until after the death of the claimant, and all such warrants as have been heretofore issued subsequent to the death of the claimant, the title to such warrants shall vest in his widow, if there be one, and, if there be no widow, then in the heirs or legatees of the claimant; and all military bounty-land warrants issued pursuant to law shall be treated as personal chattels, and may be conveyed by assignment of such widow, heirs, or legatees, or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only.

Military bounty-land warrants receivable for preemption payments.

22 March, 1852, c. 19, s. 1, v. 10, p. 3.

"SEC. 2277. All warrants for military bounty lands, which are issued under any law of the United States, shall be received in payment of preemption rights at the rate of one dollar and twenty-five cents per acre, for the quantity of land therein specified; but where the land is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full of satisfaction thereof.

Sales, mortgages, letters of attorney, etc., made before issue of warrant to be void.

28 Sept., 1850, c. 85, s. 4, v. 9, p. 521.

"SEC. 2436. All sales, mortgages, letters of attorney, or other instruments of writing going to affect the title or claim to any warrant issued or to be issued, or any land granted or to be granted, under the preceding provisions of this chapter, made or executed prior to the issue of such warrant, shall be null and void to all intents and purposes whatsoever; nor shall such warrant or the land obtained thereby be in any wise affected by, or charged with, or subject to the payment of any debt or claim incurred by any officer or soldier prior to the issuing of the patent.

Fees and commissions of register and receiver.

22 March, 1852, c. 19, s. 2, v. 10, p. 4.

"SEC. 2238. Registers and receivers in addition to their salaries shall be allowed each the following fees and commissions, namely:

* * * * * * *

Fifth. For locating military bounty-land warrants issued since the eleventh day of February, eighteen hundred and forty-seven, and for locating agricultural college land-scrip, the same commission to be paid by the holder or assignee of each warrant or scrip as is allowed for sales of the public lands for cash, at the rate of one dollar and twenty-five cents per acre."

2 July, 1862, c. 130, s. 7, v. 12, p. 505.

An act to provide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section three of the Act approved June second, eighteen hundred and fifty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the benefits now given thereto by law, all unsatisfied military bounty land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered under the desert land law of March third, eighteen hundred and eighty-seven, entitled "An Act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber-culture law of March third, eighteen hundred and seventy-three, entitled "An Act to encourage the growth of timber on the Western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nebraska, and Washington Territory," and the amendments thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

Approved December 13, 1894. [28 Stat., 594.]

LOCATION AND ASSIGNMENT OF MILITARY BOUNTY LAND WARRANTS.

CIRCULAR.

Commissioner Hermann to Registers and Receivers United States District Land Offices, July 6, 1898.

By direction of the Honorable Secretary of the Interior dated June 28, 1898, rule eleven of the office circular respecting the assignment and location of military bounty land warrants, which circular was issued July 20, 1875, and was reissued February 18, 1896, has been amended and changed to read as follows:

When the name of a person has been erroneously inserted in an assignment of a warrant and erased therefrom, there should be filed evidence satisfactory to this office, consisting of an affidavit, duly authenticated, of the assignor, or the party or parties by whom said name was erroneously inserted and the erasure made; fully explaining the facts and circumstances of such insertion and erasure, and stating that no transfer or delivery of said warrant was made to the party whose name had been so erroneously inserted, and that the ownership or custody of said warrant had not been changed by such insertion; which affidavit shall be accompanied by satisfactory evidence that a copy of the same has been served ally or by registered letter upon the party whose name was erroneously inserted. When the name of a bona fide assignee has been erased from a transfer, an assignment from said assignee to the present holder of the warrant will be required to perfect the chain of title to the warrant.

In deciding therefore as to the sufficiency of warrant assignments where the name of the assignee has been written over an erasure, you will be governed by rule eleven as herein amended,—the office circular being modified as above set forth.

Approved:

THOS. RYAN, *Secretary.*

TIMBER CULTURE ENTRY—IRREGULAR ALLOWANCE.

MYERS *v.* COLE.

A timber culture entry irregularly allowed during the pendency of a prior adverse application may be permitted to stand, where the right of such adverse applicant has been eliminated from the case, and the entryman has in manifest good faith, and at large expense, improved and cultivated the land.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 22, 1898.* (G. B. G.)

The land involved in this case is the NW. ¼ of Sec. 1, T. 104 N., R. 26 W., Marshall land district, Minnesota, and is within the primary limits of the grant for the benefit of the Southern Minnesota Railroad, under the act of July 4, 1866 (14 Stat., 87), but was excepted therefrom on account of certain pre-emption filings thereon at the date of the grant.

The tract was listed by the railroad company on account of its said grant by lists filed in the local office June 22, 1876, and November 3, 1877.

On June 16, 1883, Mary J. Williams made an application to enter the tract under the timber culture law, which was rejected by the local officers for conflict with the grant.

On June 30, 1886, your office on the appeal of Williams held that the land was excepted from the grant to the railroad company by reason of the pre-emption filings aforesaid, held the railroad list as to said tract for cancellation, and no appeal having been taken from your said office decision, the listing was canceled, April 8, 1890.

Williams was not notified of this action.

On June 25, 1889, W. F. Myers applied to make timber culture entry of the tract. His application was rejected, and he appealed.

On April 14, 1890, William G. Kellar was allowed to make timber culture entry of the tract, and on June 3, 1890, Kellar having relinquished his entry, Allen O. Cole made timber culture entry of the tract.

On March 20, 1894, your office directed that Cole's entry should stand subject to the application of Myers, and he was given time to assert his rights thereunder.

Myers appeared, and thereupon a hearing between Myers and Cole was ordered and had.

The local officers decided that Myers had not forfeited any of his rights to the land under his application to enter, having appealed from its rejection, and recommended the cancellation of Cole's entry.

On May 15, 1896, your office directed the local officers to examine the records of their office and ascertain if there was any evidence of service of notice upon Williams of the aforesaid decisions of June 30, 1886, and April 8, 1890, and if evidence of such service was not found, they were directed to notify her thereof and allow thirty days within which to appear and protect her rights.

The local officers reported, on July 1, 1896, that there was no evidence of such service in their office, and that on May 19, 1896, they notified said Williams, through her attorney, and that more than forty days had elapsed and no action had been taken by her.

Thereupon, your office on July 31, 1896, considering the case of Myers *v.* Cole, held that "Mary J. Williams having abandoned her application, Myers being next in order in point of time, has the superior right to the land."

Cole appeals.

The listing of a tract within the primary limits of a railroad grant confers no right upon the company, if, for any reason, said tract is excepted from the grant.

An application to enter a tract so "listed," and rejected for that reason and pending on appeal, will attach at once as of the date of the application, on the cancellation of the list as to said tract. Swanson *v.* Galbraith (syllabus), 21 L. D., 109.

Under this rule, the rights of Mary J. Williams under her timber culture application attached as of June 16, 1883, and did not expire until after she was notified in 1896 of the action of your office, April 8, 1890, canceling the railroad company's list.

Myers's timber culture application, made June 25, 1889, was properly rejected, for two reasons: 1st. The railroad company's list had not at that time been canceled, and, 2d. The prior application of Williams was pending. He took nothing therefore by his application, nor by his appeal from its rejection. The repeal of the timber culture law, March 3, 1891, found him without a right initiated under that law, and to permit him now to make a timber culture entry for the tract would be without authority of law. His application is therefore denied.

Mary J. Williams having abandoned the rights secured to her by virtue of her application, this case is one between Cole and the government.

The record shows that Cole paid William G. Kellar $600 for his improvements on the land, and that since he made entry therefor he has broken one hundred and twenty acres, set out ten acres of trees, built over two hundred rods of fence, and drained the land by ditching. Manifestly his entry should be permitted to stand, unless the law forbids it.

The act of March 3, 1891 (26 Stat., 1095), repealed the timber culture laws, but provided:

That this repeal shall not affect any valid rights heretofore accrued or accruing under said laws, but all *bona fide* claims lawfully initiated before the passage of this act may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not been passed.

While the application of Cole might properly have been rejected, it was allowed by the local officers, and entry was made. As an administrative question, the allowance of said application was irregular and therefore error. By reason of this irregularity the entry was voidable and not void. True, it might have been defeated by Mary J. Williams, but she is no longer in the case.

Proceeding on the faith of the government's action in allowing the entry, Cole has cultivated and improved the land at large expense and in manifest good faith, and to now cancel his entry would cast the fruits of his labor upon strangers, without benefiting the government or vindicating any public policy or statute.

Your office decision is reversed, and the entry of Cole will be held intact, subject to his compliance with law.

AMENDMENT OF PATENT—ADVERSE CLAIM.

CARLSON *v.* THORESEN.

The right of a patentee to have his entry and patent so amended as to include land actually settled upon and improved, but through mistake omitted from said entry and patent, is not defeated by an intervening entry of such tract made by one having full knowledge of the superior rights of the patentee.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *July 22, 1898.* (C. W. P.)

The case of John Carlson against Brede M. Thoresen, involving title to lot 4, of Sec. 25, T. 148, R. 42, Crookston land district, Minnesota, has been examined.

Carlson made homestead entry, No. 5168, November 27, 1888 (application 9966, made November 7, 1883), of the E. ½ of the SW. ¼, the SW. ¼ of the SW. ¼ and lot 5, of Sec. 25, T. 148, R. 42, and patent was issued for said tracts March 19, 1890. Brede M. Thoresen made homestead entry, No. 16,908, of said lot 4, June 29, 1895. August 12, 1895, Carlson filed a duly corroborated affidavit, and September 3, following, a supplemental affidavit, in the local office at Crookston, in which it is alleged, substantially, that November 7, 1883, he made homestead entry, No. 9966, in the local office, of the E. ½ of the SW. ¼, the SW. ¼ of the SW. ¼, and lot 5, Sec. 25, T. 148 N., R. 42 W.: that on November 27, 1888, he made final proof therefor; that at the time of making said entry and final proof he intended and supposed he had entered lot 4 of said section, which, with the E. ½ of the SW. ¼ and the SW. ¼ of the SW. ¼, would make all of the SW. ¼ of said Sec. 25, T. 148 N., R. 42 W., which said SW. ¼ is the land he supposed he had entered and for which he made final proof; that at the time he made his entry he went upon the SW. ¼ of Sec. 25, and built his dwelling on lot 4, and has ever since and now resides upon said lot 4, with his family; that he has made other valuable improvements upon said lot 4, and now has the same in a high state of cultivation; that said Thoresen, at the time he made homestead entry, No. 16,908, well knew that he (the said Carlson) lived upon and claimed said lot 4, and that Thoresen made said entry for the purpose of ousting the affiant and depriving him of all his improvements made on said lot 4; and asked that the entry of said Thoresen may be canceled, and that his entry as to said lot 5 may be canceled and said lot 4 included therein in place of said lot 5.

A hearing was had before the local officers on said application, and March 6, 1896, the local officers decided in favor of Carlson, which decision was affirmed by your office decision of October 19, 1896, from which Thoresen appeals.

The testimony shows, substantially, the following: Carlson can not read or speak the English language. He stated that he does not know how he came to file on lot 5 instead of lot 4; that he thought he had included lot 4 in his entry, as he intended to enter the SW. ¼; that he did not "intend to take a part of one quarter and part of another quarter;" that he has always lived on lot 4, from the date of his settlement to the present time; that he did not learn that lot 4 was not included in his entry until April, 1895; that he has on lot 4 his dwelling house, barn, granary, wagon and machine shed, and hog pen, which he valued at $385; that he has fourteen acres of said lot in cultivation, which cost $15 an acre to break and grub, and one hundred and fifty rods of ditching, and that he is ready and willing to relinquish lot 5. On cross-examination he stated that in 1888 he mortgaged his homestead, including lot 5, and that in 1893 he renewed said mortgage for $350 to the Middlesex Banking Company, which is still unsatisfied; that when the agent of said mortgage company came to examine his homestead, he showed him lot 4, with his buildings thereon as part of the land.

Arthur A. Miller, Carlson's attorney, stated that he was retained by Carlson in June, 1895, during the general term of the district court of Polk county, to commence proceedings to correct his entry, and that he was delayed in doing so by trial of cases in court and other pressing work in his office, and not by any delays on the part of the plaintiff.

Two other witnesses were called for Carlson, who say that Thoreson told them, prior to making his entry, that he knew that Carlson's buildings were on said lot 4, and one of them said that Thoreson said: "I will file on it anyhow, there will be a little to make on it."

Thoreson testified that Carlson told him that he had broken five or six acres on lot 5 since he (Thoreson) made his entry. Carlson in rebuttal testified that he never intended to do any breaking on lot 5. It is undisputed that Thoreson knew when he made his homestead entry of lot 4 that Carlson had improved a part of said lot, that he had his dwelling thereon, and that he claimed it as part of his homestead entry, and it would be a great wrong to take his home from him and give it to Thoreson.

It is contended by the counsel for Thoresen that because a patent was issued to Carlson in 1890, the Department has no jurisdiction over the title to the land in controversy, and they cite a number of cases in support of their contention. But these cases are not in point, for they only decide that with the issuance of patent the jurisdiction of the Department *over the land embraced therein* ceases so long as the patent remains outstanding.

On the other hand, are the cases of Leitner *v.* Hodge 5 L. D., 105, where through mistake in description the land entered and patented was not that upon which the entryman settled and resided, it was decided that, on surrender of the patent, a new patent should issue for the homestead claim as defined by settlement and residence. It is said in said case,

> No other person could or can acquire title to said land against him (the entryman) for it had been fully earned by his residence and cultivation, and the government now holds the legal title solely for his benefit;

Murphy *v.* Sanford, 11 L. D., 123, where it was held that (syllabus),

> As between one holding under a pre-emption entry, where by mistake the patent failed to describe the land actually purchased, and another claiming under a subsequent location of such land, made with a knowledge of the facts with respect to the prior purchase, the superior equity is with the former, and patent should issue to correct the mistake;

and Roberts *et al. v.* Gordon, 14 L. D., 475, where it was held that (syllabus),

> A patentee may be permitted to relinquish a portion of the land covered by his patent, and take in the place of the land relinquished a tract which through mistake was not included in the original entry nor in the patent issued thereon.

The decision appealed from is affirmed.

HEARINGS ORDERED UPON SPECIAL AGENTS' REPORTS.

INSTRUCTIONS.

Commissioner Hermann to Registers and Receivers, and Special Agents of the General Land Office, July 16, 1898.

These hearings are ordered as a part of the proceedings upon an inquiry instituted by the Government into the validity of alleged fraudulent or illegal entries. The purpose is to give the entrymen and other known parties in interest full opportunity to be heard in defense of their claims.

Hearings will be set at as early a day as practicable after the order has been received, so that the Special Agent who examined the case may be present, and while witnesses are accessible.

The Register and Receiver will consult with the Special Agent relative to fixing the time and place for taking testimony.

Where possible notice of hearing will be given by the Register and Receiver by registered letter or by personal service.

If the whereabouts of the party or parties in interest can not be ascertained notice should be given by publication in accordance with Rules 13 and 14 of the Rules of Practice.

Proof of service should accompany the record in every case, and, where notice is given by publication, a statement by the Register and Receiver, or a certificate from the Special Agent, or the affidavit of an

officer or other person, must be filed, showing that due diligence has been used and the party or parties could not be found.

Notice should be given in all cases at least thirty days before the date fixed for hearing.

Attorneys appearing should be required to file a written appearance, stating for whom they appear; and in all cases notice to an attorney of record will be treated as notice to the party or parties for whom he appears.

Special Agents should so arrange their business as to have testimony taken at the same time and place in as many cases as practicable. They must be present at hearings with the necessary witnesses to prove the charges made in their reports, and they will represent the Government in the conduct of cases and examination of witnesses.

Special Agents are not required to file affidavits for continuances or postponements, nor to make deposits for expenses. Continuances and postponements will be allowed only for necessary cause, and in no case for the purpose of vexation or delay.

Special Agents will not enter into stipulations relative to taking testimony, or otherwise, by which the due course of proceedings will be embarrassed or the purpose of the law frustrated.

The expenses of service of notice and the cost of taking the testimony of witnesses for the Government, both on direct and cross-examination, will be paid by Receivers, who will estimate specially therefor, referring to the date and initial of the letter ordering the hearings.

The cost of reducing testimony to writing, payable by the Government, will be the actual and necessary sums paid out for that purpose, and not fees of local officers. Such fees will not be charges to the Government.

The expenses of the claimant, including the pay of his own witnesses, the costs of taking their testimony, both on direct and cross-examination, must be paid by himself, and a reasonable deposit for expenses of reducing such testimony and cross-examination to writing may be required by the officer taking the testimony.

Upon the termination of a hearing the Register and Receiver will immediately render a decision in the case, and upon the expiration of the time allowed for appeal transmit the record to this office.

Special agents are not required to file appeals from decisions adverse to the Government, nor are they expected to file briefs in any case.

This circular is issued to take the place of circular of November 4, 1895 (21 L. D., 367), on the same subject, and will in future govern in all cases to which it applies.

Approved:

C. N. BLISS

Secretary.

RESTORATION OF RAILROAD LANDS—PRICE.

INSTRUCTIONS.

The act of July 6, 1886, Forfeiting the grant to the Atlantic and Pacific adjacent to and coterminous with the unconstructed portion of the main line of said road, and restoring the lands embraced therein to the public domain, does not constitute the bringing of a reservation into market within the meaning of section 2364 R. S.; and as said lands have never been raised in price they are now subject to disposal at $1.25 per acre, irrespective of the fact that they are also within the limits of the grant for the main and branch lines of the Southern Pacific.

The case of Atlantic and Pacific R. R. Co., 5 L. D., 269, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 22, 1898.* (F. W. C.)

By the act of July 6, 1886 (24 Stat., 123), the grant made by the act of July 27, 1866 (14 Stat., 292), to aid in the construction of the Atlantic and Pacific railroad adjacent to and coterminous with the uncompleted portion of the main line of said road, was declared forfeited and the lands restored to the public domain. Within the State of California the limits of the grant for said Atlantic and Pacific railroad, as adjusted to the line of definite location, conflict with the grants to aid in the construction of the main and branch lines of the Southern Pacific railroad.

After the passage of the act of forfeiture of July 6, 1886, *supra*, the Southern Pacific Railroad Company continued to lay claim to the lands within the limits of its grants within the overlap of the grant for the Atlantic and Pacific railroad, and suits were brought by the United States to quiet title to all of said lands, and as a consequence such lands were not included in the instructions relative to the entry of other lands within the limits of the grant for the Atlantic and Pacific railroad outside of the conflicts referred to but opposite unconstructed road.

In the case of the Southern Pacific Railroad Co. *v.* United States, 163 U. S., 1, the decree of the circuit court in favor of the United States, as to the lands therein involved, was affirmed in all respects as to the Southern Pacific Railroad Company as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the government to proceed in the circuit court to a final decree as to those defendants.

Following the decision of the court in that case, instructions were issued relative to the entry of said lands, excepting such as were claimed by others than the Southern Pacific Railroad Company and the trustees in the mortgage executed by that company; which instructions were approved May 3, 1898 (26 L. D., 697).

All the lands involved in that suit, with a few exceptions, are within the conflicting limits of the grants for the Atlantic and Pacific main line and the Southern Pacific branch line, the few exceptions being

within the conflicting limits of the grants for the Atlantic and Pacific and the Southern Pacific main lines.

In the instructions nothing was said as to the price of the land, and I am now in receipt of your office letter of July 8, 1898, submitting for my consideration a letter of instructions addressed to the register and receiver at Los Angeles, California, fixing the price to be charged in the entry of said lands.

In said letter of instructions the local officers are advised that the lands

lying outside of the primary twenty mile limits of the grant by the act of July 27, 1866 (14 Stat., 592), to the Southern Pacific Railroad Company, main line, and within the limits of the grant by the act of March 3, 1871 (16 Stat., 573), to the Southern Pacific Railroad Company, branch line, are to be disposed of at the rate of $1.25 per acre.

Although the south half of sections 7, 9 and 11, and all of sections 13, 15 and 17, in township 7 north, ranges 11, 12 and 13 west, are included in the order of restoration, the lands embraced therein will be disposed of at the rate of $2.50 per acre, for the reason that they lie within the twenty mile primary limits of the constructed Southern Pacific, main line, road.

It will be seen that the prices to be charged for these forfeited lands are not uniform. Those within the limits of the grant for the Southern Pacific branch line are to be disposed of at the rate of $1.25 per acre, while those within the limits of the grant for the main line of the Southern Pacific are to be disposed of at the rate of $2.50 per acre. It will be noted that the reason assigned for the increase in price of the latter class is "that they lie within the twenty mile primary limits of the constructed Southern Pacific, main line, road."

In referring to those within the limits of the grant for the branch line, the word "constructed" does not appear, but as a matter of fact the branch line of said road was duly constructed, so that no difference exists between the two classes of lands in this particular.

I am of opinion that no reason exists for a difference in price between the forfeited Atlantic and Pacific lands within the limits of the grants for the main and branch lines of the Southern Pacific railroad.

The lands forfeited by the act of July 6, 1886, *supra*, were those which had been previously granted to aid in the construction of that portion of the main line of the Atlantic and Pacific railroad which remained unconstructed at the date of said act. The grants to the Atlantic and Pacific, unlike some other railroad grants, contained no provision whatever relating to the price of the alternate reserved sections or of such of the odd numbered sections as remained to the United States. The only legislation upon the question is found in the latter part of section 2357 of the Revised Statutes, which reads:

Provided, That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

While some of the lands affected by these instructions fall within the primary limits as described by the grants for the main and branch lines

of said Southern Pacific railroad, they are not portions of the alternate sections reserved to the United States by said grants.

All of these lands were, by the act of July 6, 1886 (*supra*), forfeited to the United States, and by said act were restored to the public domain. The grant to the railroad company did not constitute a reservation within the meaning of section 2364 of the Revised Statutes, and the act of forfeiture did not constitute the bringing of a reservation into market within the meaning of that section. What is said to the contrary in Atlantic and Pacific Railroad Company (5 L. D., 269) is overruled. Section 2364 provides that,

> whenever any reservation of public lands is brought into market, the Commissioner of the General Land Office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.

Lands are only "brought into market" by a proclamation offering them at public sale, after which they are subject to private sale or entry. This section of the Revised Statutes is taken from the act of July 2, 1864 (13 Stat., 374), entitled, "An act relating to the sale of reservations of the public lands." It has no application to any of the lands under consideration, and as they have never been raised in price, they are subject to disposal as ordinary public lands, viz., at $1.25 per acre.

OKLAHOMA LANDS—PUBLIC LAND STRIP.

UNITED STATES *v.* MAY.

The preferred right of entry of lands in the Public Land Strip accorded all actual and bona fide settlers upon and occupants of said lands by section 18, act of May 2, 1890, extends only to persons occupying such status at the date of the passage of said act, and who thereafter make entry within a reasonable time, and show due compliance with law.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 22, 1898.* (P. J. C.)

The land in controversy is the NE. ¼ of the NE. ¼, Sec. 22, the W. ½ of the NW. ¼ and the NW. ¼ of the SW. ¼, Sec. 23, T. 2 N., R. 1 E., Woodward, Oklahoma, land district, and is situated in what is known and described as the "Public Land Strip." (Sec. 1, act of May 2, 1890, entitled "An Act to provide a temporary government for the Territory of Oklahoma," etc., 26 Stat., 81.) It was opened for settlement September 16, 1893, by the President's proclamation, under the provisions of the act of March 3, 1893 (27 Stat., 640).

December 18, 1894, George W. May made homestead entry of the tract, and on June 20, 1895, offered final proof, by which it is shown that he established actual residence thereon "in 1883 or '84;" that he has "never been absent at all with the exception of the last 20 months," when he "was temporarily absent in New Mexico."

The local officers suspended action on this proof and reported the case to a special agent.

In the letter of your office of July 6, 1896, to the register and receiver, it is said:

On March 3, 1896, Special Agent R. R. Poe reported that he had made a personal examination of said tract and found it in possession of "Juan C. Lujan," who purchased it from George W. May in October, 1893, the consideration being 665 sheep, valued at $800, over four hundred of which were delivered at time of sale, the balance to be delivered when, after the lands were open to entry, Mr. May should make his filing, secure his patent, and deliver same to Juan C. Lujan; that since October, 1893, the entryman has resided in Clayton, New Mexico, and "Lujan" has been in possession of the land, and has improvements thereon consisting of a stone house 12 x 20 feet, covered with sod, and forty acres enclosed for a pasture; all valued at $300. Also that said final proof was fraudulently made in the interest of said Juan C. Lujan.

Said final proof is accordingly rejected and said homestead entry No. 826 is held for cancellation.

You will give claimant due notice of this action, informing him of the nature and substance of the special agent's report, as set forth above, and advising him that he will be allowed sixty days in which to apply for a hearing to show cause why his entry should be sustained.

A copy of this letter was served on May, and on August 3, 1896, he applied for a hearing, "denying each and every allegation as the same is alleged to be contained in said report of special agent."

A hearing was ordered and the testimony taken before a probate judge, and on examination thereof the local officers found that the testimony did not sustain the report of the special agent; "on the contrary, the testimony shows that May took the land in good faith, made the proof for his own benefit, and is the owner of the improvements:" and they sustained the objection of counsel for May to testimony offered tending to show that May had not resided on the land as required by law, for the reason that May was "not notified of the government's intention to introduce proof upon any grounds other than that set forth" in your said letter of July 6, 1896. They recommended that the entry be sustained and that final receipt and certificate issue.

On consideration of the case, your office, by decision of November 14, 1896, held that the action of the local officers in rejecting the testimony as to May's residence was erroneous; that while the principal charge was that the entryman had entered into a contract agreeing that the entry should be made in the interest of another, yet it was stated in the letter "that since October, 1893, the entryman had resided in Clayton, New Mexico." Upon the ground that he had not resided on the land, the action of the local officers was reversed.

May's appeal brings the case before the Department, and it is alleged that your office decision erred in holding that the question of abandonment was involved in the hearing; in not finding that he had shown full compliance with the homestead law, and "in holding the entry for cancellation, no bad faith being shown and the seven years within which proof is required by law not having expired."

The Department concurs in the decision of your office that the question of abandonment by the entryman was put in issue by the order of your office of July 6, 1896. It is true that it was not given the prominence that the alleged agreement was, but it was sufficiently specific and definite, in view of the general provisions of the homestead law, to require it to be met.

It appears that May settled on the land in 1884, and occupied the same until some time in 1893. His residence was not, however, continuous, for it is shown that in 1888 he made a pre-emption filing in New Mexico, and made final proof on the same in 1891. The testimony shows that in September, 1893, he leased the land in controversy to Juan C. Lujan for the term of three years, commencing March 1, 1894; that from about the date of said lease, May ceased to reside on the land; that he moved his effects therefrom in the spring of 1894, and has resided in Clayton, New Mexico. So that it will be seen, both by the testimony and the final proof, that at the time of making his entry he was not residing on the land, had not been for more than a year prior thereto, and at no time since has he resided thereon.

Under the provisions of the general homestead law it would be little short of absurd to discuss an entry made under these circumstances, but under the provisions of section 18 of the act of May 2, 1890, *supra*, it is contended that this entry is a legal one and should stand. The paragraph specially referring to this land reads as follows:

> All the lands embraced in that portion of the Territory of Oklahoma heretofore known as the Public Land Strip shall be open to settlement under the provisions of the homestead laws of the United States, except section twenty-three hundred and one of the Revised Statutes, which shall not apply; but all actual and *bona fide* settlers upon and occupants of the lands in said Public Land Strip at the time of the passage of this act shall be entitled to have preference to and hold the lands upon which they have settled under the homestead laws of the United States, by virtue of their settlement and occupancy of said lands, and they shall be credited with the time they have actually occupied their homesteads, respectively, not exceeding two years, on the time required under said laws to perfect title as homestead settlers.

The Public Land Strip, being that part of what is now Oklahoma Territory bounded on the east by the one-hundredth meridian, on the south by Texas, on the west by New Mexico, and on the north by Colorado and Kansas, was not a purchase from the Indians, as was the other lands in that Territory, and, belonging to the United State, there was known to be many settlers thereon. It was the evident intent of Congress, therefore, to afford some special protection for these settlers on the public domain. The land was made subject to entry under the general homestead laws, except as to the commutation privilege provided for by section 2301 of the Revised Statutes. This, however, was subsequently amended by the act of October 20, 1893 (28 Stat., 3), which allowed their commutation on the payment of one dollar and twenty-five cents per acre. The inhibition against premature entrance and occupancy, from the very nature of the act, did not extend to this part of the Territory, as it did to other portions. (General Circular,

Ed. 1895, p. 49.) Those who were *bona fide* settlers and occupants of the land on May 2, 1890, the date of the passage of the act, were "entitled to have preference to and hold the lands upon which they had settled under the homestead laws," by virtue of their settlement and occupancy, and were to be credited with not exceeding two years on the time required to perfect title as homestead settlers.

It is contended by counsel that "May's five years expired May 2, 1893." This is upon the theory, it is presumed, that this preference right dated back two years from the date of the act, which would take it to May 2, 1888. It is claimed that, as he was a settler and occupying the land on May 2, 1893, he had a right to leave the land at that time, that he had fully complied with the homstead law, and was entitled to a patent.

In reference to the pre-emption entry by May, in New Mexico, one witness says he "located" a claim October 2, 1889, and resided thereon up to June 8, 1891, while May himself says that he made his filing in 1888, that there was a contest over it, and that he proved up in 1891. The presumption is, and the entryman will not be heard to dispute it, that he was living upon his pre-emption claim during these years, and that being his residence at the time of the passage of the act, he could not be a *bona fide* settler and occupant of lands in the Public Land Strip. The provisions of this statute do not, therefore, apply to this case.

Aside from this, however, even if he did come within the terms of the statute, it is considered that there was such an abandonment of the land as to defeat the entry. This land was opened for settlement and entry September 16, 1893. At that time he had left the land and gone to New Mexico. He did not make entry for it until December 18, 1894, and at that time and for more than a year prior thereto, had not resided thereon and did not resume or establish a residence after his entry. The statute under consideration contemplates a compliance with the homestead laws in all respects except as to the time within which final proof may be made, the main consideration aside from this being only to give *bona fide* settlers and occupants a preference to hold the lands under said laws. There must be a compliance with the requirements of the law after the passage of the act and reasonable diligence in making the entry. Both these essentials are lacking in this case.

While the entryman can claim no superior right by reason of this statute, yet, inasmuch as there is no adverse right or claim to the land asserted, and the issue as here presented is one between the government and the entryman, there seems to be no reason why the entry may not remain of record and the entryman given an opportunity to make final proof and entry, showing a compliance with the requirements of the homestead law.

The judgment of your office is modified to this extent.

EVIDENCE—NOTICE OF CONTEST—CHARGE OF ABANDONMENT.

MILLER *v.* WORNER.

Testimony with respect to a charge not specified in the notice of contest is inadmissible and irrelevant, and on objection thereto should not be considered.

A charge of failure to reside upon and cultivate land embraced within a homestead entry filed prior to the expiration of six months from the date of said entry is premature and presents no ground for a hearing.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 22, 1898.* (E. B., Jr.)

This is a contest for title to the E.½ of the SW.¼ and the N.½ of the SE.¼ of section 1, T. 12 N., R. 2 W., New Orleans, Louisiana, land district. The land was entered as a homestead September 19, 1894, by Patrick H. Furlong, who, on October 22, 1895, relinquished the same. On the last-mentioned date Edward F. Worner made homestead entry thereof.

On December 3, 1895, Charles A. J. Miller filed his duly corroborated affidavit of contest against Worner's entry, alleging that Worner had not resided on the land since his entry; that he had not settled upon and cultivated the land as required by law, and, in effect, that affiant had made settlement thereon in September, 1885, and had occupied, cultivated and improved the land with the intention of making homestead entry of the same. Thereupon notice of contest, charging abandonment, only, and fixing January 11, 1896, for a hearing at the local office, was given the entryman. Pursuant to a commission issued January 3, 1896, by the local office, and by consent of parties, testimony was taken January 8, 1896, before an United States Commissioner at Winfield, Louisiana, saving to each party the right to object at the trial before the local office to testimony deemed "inadmissible," or "inapplicable." The testimony thus taken was filed in the local office on January 10, 1896, and at the same time there was filed a motion, by the contestee, to exclude from consideration, as irrelevant and inadmissible, all testimony not pertaining to the question of abandonment, and to dismiss the contest for the reason that "no contest on the ground of abandonment can lie until six months from the date of entry." This motion the local office overruled, and, on January 13, 1896, gave judgment in favor of Miller, on the ground that his settlement right was superior to the claims of Worner under his entry. Upon appeal by Worner your office, on July 18, 1896, affirmed the decision of the local office. An appeal by Worner, wherein he assigns—as he did in his appeal to your office—error upon the action of the local office in overruling the said motion, brings the case to the Department.

The motion should have been sustained, saving, of course, to the contestant, the right to have notice issued and to proceed thereunder on the allegation of prior settlement. Under the notice issued, the entryman was not required to answer to the allegation of a superior settlement

right in Miller. Testimony in support of that allegation was inadmissible and irrelevant under the notice given, and should not have been considered. The allegation of failure to reside upon and cultivate the land was clearly premature, since nothing of the kind is required of a homestead entryman within six months of the date of his entry. Although broadly and generally stated as "abandonment" in the notice of contest, the actual charge covered thereby was the specific allegation just mentioned. It is unnecessary, in view of the said allegation, to discuss the question, which has been suggested during the consideration of this case, whether, under certain circumstances, a charge of abandonment might not lie against a homestead entryman within six months of the date of his entry. Such question is herein purely hypothetical. It is enough to decide this case upon the facts presented and the law applicable thereto.

The decision of your office is accordingly modified. Miller will be allowed a reasonable time within which to proceed on his allegation of prior settlement, failing which, his contest will be dismissed.

REGULATIONS CONCERNING HOMESTEADS, RIGHTS OF WAY, TIMBER, ETC., IN ALASKA.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 8, 1898.

The following instructions, issued under the act of Congress approved May 14, 1898 (Public—No. 95), entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," are for the guidance of the local officers in their administration of the law and for the information of those concerned in its provisions.

Section 1 relates to

HOMESTEAD RIGHTS IN ALASKA,

and provides:

SEC. 1. That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said District of Alaska shall be located within or taken from lands in said District: *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said District: *And it is further provided*, That no homestead shall exceed eighty acres in extent.

1. This section may be summarized as—

First.—Extending the homestead laws and the rights incident thereto to the District of Alaska;

Second.—Extending to such District the right to enter surveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights;

Third.—Granting the right to enter unsurveyed lands in said District under provisions of law relating to the acquisition of title through soldiers' additional homestead rights;

Fourth.—Prohibiting the location in said District of any indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said District;

Fifth.—Limiting each entry under this section to 80 rods along the shore of any navigable water, and reserving along such shore a space of at least 80 rods between all such claims, and prohibiting the entry or disposal of the shore (meaning land lying between high and low water mark) of any navigable waters within said District; and

Sixth.—Limiting each homestead in said District, whether soldiers' additional or otherwise, to 80 acres in extent.

2. Full instructions with reference to the general homestead law and soldiers' additional homestead rights will be found in the general circular of October 30, 1895, and will, so far as applicable, govern the making of entries under this section.

3. Existing homestead laws, while recognizing settlement upon unsurveyed public lands do not authorize the entry or the patenting thereof until the public surveys have been regularly extended over them. This section, however, in terms authorizes the entry of unsurveyed lands in Alaska through the exercise of soldiers' additional homestead rights: but this does not apply to the general homestead right.

4. The act makes no direct provision for the surveying of lands sought to be entered as soldiers' additional homestead claims, and therefore special surveys must be made of such lands in the manner provided for in section 10 of this act, at the expense of the applicant.

5. A claim under this section, which extends to the shore line on any navigable stream, inlet, gulf, bay, or seashore, will be subject to the servitude provided for in that portion of section 10 which reads: "and a roadway sixty feet in width parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway," and the lands subject to such servitude will be computed as a part of the area entered.

6. That part of section 10 relating to the execution of affidavits, testimony, proofs, and other papers, anywhere in the United States before any court, judge, or other officer authorized to administer an oath, applies equally to this section.

Sections 2 to 9, inclusive, relate to

RIGHT OF WAY FOR RAILROADS, WAGON ROADS, AND TRAMWAYS IN THE DISTRICT OF ALASKA.

These sections provide:

SEC. 2. That the right of way through the lands of the United States in the District of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road; also the right to take from the lands of the United States adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also the right to take for railroad uses, subject to the reservation of all minerals and coal therein, public lands adjacent to said right of way for station buildings, depots, machine shops, side tracks, turn-outs, water stations, and terminals, and other legitimate railroad purposes, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, excepting at terminals and junction points, which may include additional forty acres, to be limited on navigable waters to eighty rods on the shore line, and with the right to use such additional ground as may in the opinion of the Secretary of the Interior be necessary where there are heavy cuts or fills: *Provided*, That nothing herein contained shall be so construed as to give to such railroad company, its lessees, grantees, or assigns the ownership or use of minerals, including coal, within the limits of its right of way, or of the lands hereby granted: *Provided further*, That all mining operations prosecuted or undertaken within the limits of such right of way or of the lands hereby granted shall, under rules and regulations to be prescribed by the Secretary of the Interior, be so conducted as not to injure or interfere with the property or operations of the road over its said lands or right of way. And when such railway shall connect with any navigable stream or tide water such company shall have power to construct and maintain necessary piers and wharves for connection with water transportation, subject to the supervision of the Secretary of the Treasury: *Provided*, That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high water mark. That all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by section six of an Act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior.

SEC. 3. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile shall not prevent any other railroad company from the

use and occupancy of said canyon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any tramway, wagon road, or other public highway now located therein, nor prevent the location through the same of any such tramway, wagon road, or highway where such tramway, wagon road, or highway may be necessary for the public accommodation; and where any change in the location of such tramway, wagon road, or highway is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such tramway, wagon road, or highway, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road or tramway: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile, and that where the space is limited the United States district court shall require the road first constructed to allow any other railroad or tramway to pass over its track or tracks through such canyon, pass, or defile on such equitable basis as the said court may prescribe; and all shippers shall be entitled to equal accommodations as to the movement of their freight and without discrimination in favor of any person or corporation: *Provided*, That nothing herein shall be construed as depriving Congress of the right to regulate the charges for freight, passengers, and wharfage.

SEC. 4. That where any company, the right of way to which is hereby granted, shall in the course of construction find it necessary to pass over private lands or possessory claims on lands of the United States, condemnation of a right of way across the same may be made in accordance with section three of the Act entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,'" approved July second, eighteen hundred and sixty-four: *Provided further*, That any such company, by filing with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, shall have the right at any time within one year thereafter, to file the map and profile of definite location provided for in this Act, and such preliminary survey and plat shall, during the said period of one year from the time of filing the same, have the effect to render all the lands on which said preliminary survey and plat shall pass subject to such right of way.

SEC. 5. That any company desiring to secure the benefits of this Act shall, within twelve months after filing the preliminary map of location of its road as hereinbefore prescribed, whether upon surveyed or unsurveyed lands, file with the register of the land office for the district where such land is located a map and profile of at least a twenty-mile section of its road or a profile of its entire road if less than twenty miles, as definitely fixed, and shall thereafter each year definitely locate and file a map of such location as aforesaid of not less than twenty miles additional of its line of road until the entire road has been thus definitely located, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the records of said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within one year after the definite location of said

section so approved, or if the map of definite location be not filed within one year as herein required, or if the entire road shall not be completed within four years from the filing of the map of definite location, the rights herein granted shall be forfeited as to any such uncompleted section of said road, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way, stations, and terminals shall cease and become null and void without further action.

SEC. 6. That the Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said District, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said District for the construction of said wagon roads or tramways, together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years, and said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States: *Provided*, That such lands may be located concurrently with the line of such road or tramway, and the plat of preliminary survey and the map of definite location shall be filed as in the case of railroads and subject to the same conditions and limitations: *Provided further*, That such rights of way and privileges shall only be enjoyed by or granted to citizens of the United States or companies or corporations organized under the laws of a State or Territory; and such rights and privileges shall be held subject to the right of Congress to alter, amend, repeal, or grant equal rights to others on contiguous or parallel routes. And no right to construct a wagon road on which toll may be collected shall be granted unless it shall first be made to appear to the satisfaction of the Secretary of the Interior that the public convenience requires the construction of such proposed road, and that the expense of making the same available and convenient for public travel will not be less on an average than five hundred dollars per mile: *Provided*, That if the proposed line of road in any case shall be located over any road or trail in common use for public travel, the Secretary of the Interior shall decline to grant such right of way if, in his opinion, the interests of the public would be injuriously affected thereby. Nor shall any right to collect toll upon any wagon road in said District be granted or inure to any person, corporation, or company until it shall be made to appear to the satisfaction of said Secretary that at least an average of five hundred dollars per mile has been actually expended in constructing such road; and all persons are prohibited from collecting or attempting to collect toll over any wagon

road in said District, unless such person or the company or person for whom he acts shall at the time and place the collection is made or attempted to be made possess written authority, signed by the Secretary of the Interior, authorizing the collection and specifying the rates of toll: *Provided*, That accurate printed copies of said written authority from the Secretary of the Interior, including toll, freight, and passenger charges thereby approved, shall be kept constantly and conspicuously posted at each station where toll is demanded or collected. And any person, corporation, or company collecting or attempting to collect toll without such written authority from the Secretary of the Interior, or failing to keep the same posted as herein required, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined for each offense not less than fifty dollars nor more than five hundred dollars, and in default of payment of such fine and costs of prosecution shall be imprisoned in jail not exceeding ninety days, or until such fine and costs of prosecution shall have been paid.

That any person, corporation, or company qualified to construct a wagon road or tramway under the provisions of this act that may heretofore have constructed not less than one mile of road, at a cost of not less than five hundred dollars per mile, or one-half mile of tramway at a cost of not less than five hundred dollars, shall have the prior right to apply for such right of way and for lands at stations and terminals and to obtain the same pursuant to the provisions of this Act over and along the line hitherto constructed or actually being improved by the applicant, including wharves connected therewith. That if any party to whom license has been granted to construct such wagon road or tramway shall, for the period of one year, fail, neglect, or refuse to complete the same, the rights herein granted shall be forfeited as to any such uncompleted section of said wagon road or tramway, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way shall cease and become null and void without further action. And if such road or tramway shall not be kept in good condition for use, the Secretary of the Interior may prohibit the collection of toll thereon pending the making of necessary repairs.

That all mortgages executed by any company acquiring a right of way under this Act, upon any portion of its road that may be constructed in said District of Alaska, shall be recorded with the Secretary of the Interior, and the record thereof shall be notice of their execution, and shall be a lien upon all the rights and property of said company as therein expressed, and such mortgage shall also be recorded in the office of the secretary of the District of Alaska and in the office of the secretary of the State or Territory wherein such company is organized: *Provided*, That all lawful claims of laborers, contractors, subcontractors, or material men, for labor performed or material furnished in the construction of the railroad, tramway, or wagon road shall be a first lien thereon and take precedence of any mortgage or other lien.

SEC. 7. That this act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by act of Congress.

SEC. 8. That Congress hereby reserves the right at any time to alter, amend, or repeal this act or any part thereof; and the right of way herein and hereby authorized shall not be assigned or transferred in any form whatever prior to the construction and completion of at least

one fourth of the proposed mileage of such railroad, wagon road, or tramway, as indicated by the map of definite location, except by mortgages or other liens that may be given or secured thereon to aid in the construction thereof: *Provided*, That where within ninety days after the approval of this act, proof is made to the satisfaction of the Secretary of the Interior that actual surveys, evidenced by designated monuments, were made, and the line of a railroad, wagon road, or tramway located thereby, or that actual construction was commenced on the line of any railroad, wagon road, or tramway, prior to January twenty-first, eighteen hundred and ninety-eight, the rights to inure hereunder shall, if the terms of this act are complied with as to such railroad, wagon road, or tramway, relate back to the date when such survey or construction was commenced; and in all conflicts relative to the right of way or other privilege of this act the person, company, or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right.

SEC. 9. That the map and profile of definite location of such railroad, wagon road, or tramway, to be filed as hereinbefore provided, shall, when the line passes over surveyed lands, indicate the location of the road by reference to section or other established survey corners, and where such line passes over unsurveyed lands the location thereon shall be indicated by courses and distances and by references to natural objects and permanent monuments in such manner that the location of the road may be readily determined by reference to descriptions given in connection with said profile map.

7. The grant made by these sections does not convey an estate in fee in the lands used for right of way or lands used for station and terminal facilities. The grant is merely of a right of use for the necessary and legitimate purposes of the roads, the fee remaining in the United States, except as to lands authorized to be sold under section 6 by the Secretary of the Interior, "upon such expressed conditions as in his judgment may be necessary to protect the public interests." The nature of these conditions will depend upon the public necessities and will be governed by the particular circumstances of each case.

8. All persons entering public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as a part of the area of the tract entered.

9. Whenever any right of way shall pass over private land or possessory claims on lands of the United States, condemnation of the right of way across the same may be made in accordance with the provisions of section 4.

INCORPORATED COMPANIES.

10. Any incorporated company desiring to obtain the benefits of these sections is required to file the following papers and maps:

First. A copy of its articles of incorporation duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same is the existing law.

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

Fourth. The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory where organized. (Form 1, Appendix.)

Fifth. An affidavit by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2, Appendix.)

Sixth. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

Seventh. Maps, field notes, and other papers as hereinafter required.

INDIVIDUALS OR ASSOCIATIONS OF INDIVIDUALS.

11. Individuals or associations of individuals making applications for a permit, under section 6, for tramways or wagon roads, are required to file evidence of citizenship. In the case of associations, an affidavit must be filed by the principal officer thereof giving a list of the members, and stating that the list includes all the members. Evidence of citizenship must be furnished for each member of the association. Individuals and associations will also be required to file the maps, field notes, and other papers hereinafter required.

12. All maps and plats must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey thereof, wherever such surveys have been made. The word profile as used in the act is understood to intend a map of alignment. No profile of grades will be required.

13. The maps should show any other road crossed or with which connection is made, and whenever possible the station number on the survey thereof at the point of intersection. All such intersecting roads must be represented in ink of a different color from that used for the line for which the applicant asks right of way. Field notes of the surveys should be written along the line on the map. If the map should be too much crowded to be easily read, then duplicate field notes should be filed separate from the map, and in such form that they may

be folded for filing. In such case it will be necessary to place on the map only a sufficient number of station numbers to make it convenient to follow the field notes on the map. Station numbers should also be given on the map in all cases where changes of numbering occur and where known lines of survey, public or otherwise, are crossed, with distance to the nearest permanent monument or other mark on such line. The map must also show the lines of reference of initial, terminal, and intermediate points, with their courses and distances.

14. Typewritten field notes, with clear carbon copies, are preferred, as they expedite the examination of applications. All monuments and other marks with which connections are made should be fully described, so that they may be easily found. The field notes must be so complete that the line may be retraced on the ground. On account of the conditions existing in Alaska, surveys based wholly on the magnetic needle will not be accepted. In that case a true meridian should be established, as accurately as possible, at the initial point. It should be permanently marked and fully described. The survey should be based thereon and checked by a meridian similarly fixed at the terminal point and, when the line is a long one, by intermediate meridians at proper intervals. On account of the rapid convergence of the meridians in these latitudes, such intermediate meridians should be established at such intervals as to avoid large discrepancies in bearings. It will probably be found preferable to run by transit deflections from a permanently established line, with frequent and readily recoverable reference lines permanently marked; and in such surveys occasional true bearings should be stated, at least approximately. On all lines of railroad the 10-mile sections should be indicated and numbered, and on maps of tramways and wagon roads the 5-mile sections shall likewise be indicated and numbered.

15. The maps, field notes, and accompanying papers should be filed in the local land office for the district where the proposed right of way is located.

16. Connections should be made with other surveys, public or private, whenever possible; also with mineral monuments and other known and established marks. When a sufficient number of such points are not available to make such connections at least every 6 miles, the surveyor must make connection with natural objects or permanent monuments.

17. Along the line of survey, at least once in every mile, permanent and easily recoverable monuments or marks must be set and connected therewith, in such positions that the construction of the road will not interfere with them. The locations thereof must be indicated on the maps. All reference points must be fully described in the field notes, so that they may be relocated, and the exact point used for reference indicated.

18. The termini of a line of road should be fixed by reference of course and distance to a permanent monument or other definite mark. The

initial point of the survey or station, terminal and junction grounds should be similarly referred. The maps, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4, Appendix), should each show these connections.

19. The engineer's affidavit and applicant's certificate must be written on the map, and must both designate by termini (as in the preceding paragraph) and length in miles and decimals, the line of route for which right of way application is made (see Forms 3 and 4, Appendix). Station, terminal, or junction grounds must be described by initial point (as in the preceding paragraph) and area in acres (see Forms 7 and 8, Appendix), when they are located on surveyed land, and the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein. When the applicant is an individual the word "applicant" should be used instead of "company," and such other changes made as are necessary on this account.

20. Where additional width is desired for railroad right of way on account of heavy cuts or fills, the additional right of way desired should be stated, the reason therefor fully shown, the limits of the additional right of way exactly designated, and any other information furnished that may be necessary to enable the Secretary of the Interior to consider the case before giving it his approval.

21. The preliminary map authorized by the proviso of section 4 will not be required to comply so strictly with the foregoing instructions as maps of definite location, but it is to be observed that they must be based upon an actual survey, and that the more fully they comply with these regulations the better they will serve their object, which is to indicate the lands to be crossed by the final line and to preserve the company's prior right until the approval of its maps of definite location. Unless the preliminary map and field notes are such that the line of survey can be retraced from them on the ground, they will be valueless for the purpose of preserving the company's rights. The preliminary map and field notes should be in duplicate, and should be filed in the local land office, in order that proper notations may be made on the records as notice to intending settlers and subsequent applicants for the right of way.

22. The scale of maps showing the line of route should be 2,000 feet to an inch. The maps may, however, be drawn to a larger scale when necessary; but the scale must not be so greatly increased as to make the map inconveniently large for handling. In most cases, by furnishing separate field notes, an increase of scale can be avoided. Plats of station, terminal, and junction grounds, etc., should be drawn on a scale of 400 feet to an inch, and must be filed separately from the line of route. Such plats should show enough of the line of route to indicate the position of the tract with reference thereto.

23. Plats of station, terminal, and junction grounds must be prepared in accordance with the directions for maps of lines of route. Whenever they are located on or near navigable waters the shore line must be shown, and also the boundaries of any other railroad grounds or other claims located on or near navigable waters within a distance of 80 rods from any point of the tract applied for.

24. All applications for permits made under section 6 of this act should state whether it is proposed to collect toll on the proposed wagon road or tramway; and, in case of wagon roads, the application must be accompanied by satisfactory evidence, corroborated by affidavit, tending to show that the public convenience requires the construction of the proposed road, and that the expense of making the same available and convenient for public travel will not be less, on an average, than $500 per mile. In all cases, if the proposed line of road shall be located over any road or trail in common use for public travel, a satisfactory statement, corroborated by affidavit, must be submitted with the application, showing that the interests of the public will not be injuriously affected thereby.

25. When maps are filed, the local officers will make such pencil notations on their records as will indicate the location of the proposed right of way as nearly as possible. They should note that the application is pending, giving the date of filing and name of applicant. They must also indorse on each map and other paper the date of filing, over their written signature, transmitting them promptly to the General Land Office.

26. Upon the approval of a map of definite location or station plat by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will make such notations of the approval on their records, in ink, as will indicate the location of the right of way as accurately as possible.

27. When the road is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6, Appendix) should be filed in the local land office in duplicate, for transmission to the General Land Office. In case of deviations from the map previously approved, whether before or after construction, there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case; and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended; said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.

28. Unless the proper evidence of construction is filed within the time prescribed by the act for the construction of each section of the road, appropriate steps will be taken looking to the cancellation of the approval of the right of way and the notations thereof on the records.

CHARGES FOR TRANSPORTATION OF PASSENGERS AND FREIGHT.

29. A printed copy of all charges for the transportation of freight and passengers on right-of-way railroads in Alaska shall be forwarded to the Commissioner of the General Land Office for submission to the Secretary of the Interior for his consideration and approval.

In the case of a wagon road or tramway built under permit issued under section 6 of this act, upon which it is proposed to collect toll, a printed schedule of the rates for freight and passengers should also be filed with the Commissioner of the General Land Office for submission to the Secretary of the Interior for his consideration and approval at least sixty days before the road is to be opened to traffic, in order to allow a sufficient time for consideration, inasmuch as by section 6 it is made a misdemeanor to collect toll without written authority from the Secretary of the Interior. In the case of a wagon road satisfactory evidence, corroborated by affidavit, must be submitted with said schedule, showing that at least an average of $500 per mile has been actually expended in constructing such road. These schedules must be submitted in duplicate, one copy of which, bearing the approval of the Secretary of the Interior, will be returned to the applicant if found satisfactory. Said schedules shall be plainly printed in large type.

Section 10 relates to

ENTRIES FOR TRADE, MANUFACTURE, OR OTHER PRODUCTIVE INDUSTRY, IN THE DISTRICT OF ALASKA,

and provides—

SEC. 10. That any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at two dollars and fifty cents per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry, such tract of land not to include mineral or coal lands, and ingress and egress shall be reserved to the public on the waters of all streams, whether navigable or otherwise: *Provided*, That no entry shall be allowed under this Act on lands abutting on navigable water of more than eighty rods: *Provided further*, That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this Act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings, and wharves, with the provision that the public shall have access to and proper use of such wharves, and landings, at reasonable rates of toll to be prescribed by

said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway: *Provided further*, That in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim, by reason of actual possession and continued occupation in good faith, shall be entitled to purchase the same, but where several persons are or may be so possessed of parts of the tract applied for the same shall be awarded to them according to their respective interests: *Provided further*, That all claims substantially square in form and lawfully initiated, prior to January twenty-first, eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the Act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said Act, but subject to the requirements and provisions of this Act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods: *And provided further*, That the Secretary of the Interior shall reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay, or seashore for landing places for canoes and other craft used by such natives: *Provided*, That the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this Act.

That all affidavits, testimony, proofs, and other papers provided for by this Act and by said Act of March third, eighteen hundred and ninety-one, or by any departmental or Executive regulation thereunder, by depositions or otherwise, under commission from the register and receiver of the land office, which may have been or may hereafter be taken and sworn to anywhere in the United States, before any court, judge, or other officer authorized by law to administer an oath, shall be admitted in evidence as if taken before the register and receiver of the proper local land office. And thereafter such proof, together with a certified copy of the field notes and plat of the survey of the claim, shall be filed in the office of the surveyor-general of the District of Alaska, and if such survey and plat shall be approved by him, certified copies thereof, together with the claimant's application to purchase, shall be filed in the United States land office in the land district in which the claim is situated, whereupon, at the expense of the claimant, the register of such land office shall cause notice of such application to be published for at least sixty days in a newspaper of general circulation published nearest the claim within the District of Alaska, and the applicant shall at the time of filing such field notes, plat, and application to purchase in the land office, as aforesaid, cause a copy of such plat, together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted in a conspicuous place on such claim continuously for at least sixty days, and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adju-

dication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

30. A somewhat similar right of purchase was granted by sections 12 and 13 of the act of March 3, 1891, and the section now under consideration gives recognition to claims lawfully initiated under that act prior to January 21, 1898, and provides for perfecting and patenting them upon compliance with the provisions of that act, but subject to the requirements and provisions of this act, except as to area, and also subject to a limitation of 160 rods in extent along a water front.

31. The provisions of section 10 of this act being largely in conflict with sections 12 and 13 of the act of March 3, 1891, and it being apparent that section 10 of this act was intended to fully cover with new legislation the field theretofore occupied by sections 12 and 13 of the former act, it follows that section 10 of this act must be treated as repealing those sections, subject only to the saving clause respecting claims initiated thereunder before January 21, 1898.

32. Under the law of 1891 the record claim was initiated by an application made to the surveyor-general for a survey of the tract occupied and used. An estimate was prepared by said officer of the cost of such survey, and upon deposit of that amount the survey was ordered to be made by a deputy surveyor, and was required to be approved by the surveyor-general and the Commissioner of the General Land Office before purchase could be allowed. Under the present law, as in the case of mining claims, the claimant, at his own expense, can procure the making of the survey without first making application to the surveyor-general, but the survey when made is to be submitted to and approved by the surveyor-general.

33. The statute does not directly state by whom the survey is to be made, but to insure official responsibility for the work, and the better to protect the interests of all concerned, the surveys must be made by deputy surveyors, who will be appointed in sufficient number by the surveyor-general on satisfactory showing of their fitness, and who will each be required to enter into a bond in the penal sum of $5,000 for the faithful execution, according to law and instructions, of all surveys made in pursuance of his appointment as deputy surveyor. Upon appointment the deputy must take the oath of office required by section 2223, Revised Statutes.

34. Upon completion of the survey the deputy should certify to the field notes and plat, which must then be filed with the surveyor-general, together with proof, which may consist of affidavits duly corroborated by two witnesses, showing:

First.—The actual use and occupancy of the land applied for for the purposes of trade, manufacturing, or other productive industry; that it embraces the applicant's improvements and is needed in the prosecution of the enterprise.

Second.—The date when the land was first so occupied.

Third.—The character and value of improvements thereon, and the nature of the trade, business or productive industry conducted thereon.

Fourth.—That the tract applied for does not include mineral or coal lands, and is essentially nonmineral in character.

Fifth.—That no portion of said land is occupied or reserved for any purpose by the United States, or occupied or claimed by any natives of Alaska, or occupied as a town site or missionary station, or reserved from sale, and that the tract does not include improvements made by or in possession of another person, association, or corporation.

Sixth.—If the land abuts on any navigable stream, inlet, gulf, bay, or seashore, that it is not within 80 rods of any tract sold or entered under the provisions of this act. Lands patented or to which a right to patent had fully accrued under the act of March 3, 1891, are not "tracts sold or entered under the provisions of this act" within the meaning of this provision.

In the completion under this act of entries initiated prior to January 21, 1898, under the act of March 3, 1891, this showing will not be required.

The deputy surveyor in certifying each survey abutting upon navigable waters must state the name and location of every claim within 80 rods of the claim surveyed.

Seventh.—If the application is made for the benefit of an individual, he must prove his citizenship and age.

Eighth.—If the application is made for the benefit of an association it must so appear, and the citizenship and age of each member thereof be shown.

Ninth.—If the application is made for the benefit of a corporation, the incorporation must be established by the certificate of the secretary of the State or Territory or other officer having custody of the record of incorporation, and it must be further shown that such corporation is authorized by the law under which it is incorporated to hold lands in the Territories.

35. All affidavits may be made before the register or receiver of the land office in the district in which the land is situated, or anywhere in the United States before any court judge or other officer authorized by law to administer an oath.

36. If the survey is approved by the surveyor general, certified copies of the field notes and plat, together with the original proof filed by applicant to establish his claim, must be filed in the local land office with his application to purchase. Thereupon, at the expense of the claimant (who must furnish the agreement of the publisher to hold the applicant for patent alone responsible for charges of publication), the register of such local land office shall cause notice of the application to purchase to be published for a period of at least sixty days in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

Whether published in a weekly, semiweekly, or daily newspaper, the notice must appear in each and every issue of the paper for a period of sixty days, excluding the day of the first publication in computing the period of sixty days; the applicant must also, during the period of publication, cause a copy of the plat, duly authenticated, together with a copy of the application to purchase, to be posted in a conspicuous place upon the claim for at least sixty days. The register shall cause a copy of the application to purchase to be posted in his office during the period of publication.

37. During the period of posting and publication, or within thirty days thereafter, any person, corporation, or association having or asserting an adverse interest in or claim to the tract of land, or any part thereof, sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof; and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the district of Alaska; in which event no further action will be taken in the local office upon the application to purchase until the final adjudication of the rights of the parties in the court.

38. If at the expiration of the period prescribed therefor no adverse claim is filed and no other sufficient objection appears to the proposed purchase, cash certificate will issue for the land in the name of the applicant upon his furnishing proof of publication and posting of the notice as required and making due payment for the land. This proof shall consist of the affidavit of the publisher or foreman of the newspaper employed that the notice (a copy of which must be attached to the affidavit) was published for the required period in the regular and entire issue of every number of the paper during the period of publication, in the newspaper proper and not in the supplement. Proof of posting on the claim will consist of the affidavits of the applicant and two witnesses, who of their own knowledge know that the plat of survey and application to purchase were posted as required and remained so posted during the required period. The register should certify to the posting of the notice in a conspicuous place in his office during the period of publication.

39. A failure to make due payment for the land for a period of three months after the final adjudication of the rights of the parties by the court or after the period for filing an adverse claim shall have expired, without any such claim being filed, will be deemed an abandonment of the application to purchase.

40. Upon a proper showing, duly corroborated, that any claim does not conform to the requirement of the law, a hearing will be ordered in the premises.

41. A roadway 60 feet in width, parallel to the shore line as near as may be practicable, is reserved for the use of the public as a highway.

"Shore line" here means high-water line. This reservation occurs in the proviso relating to the reservation between claims abutting on navigable waters; but since it is its purpose to reserve a roadway for public use as a highway along the shore line of navigable waters, it is held to relate to the lands entered or purchased under this act, as well as to the reserved lands; otherwise it would serve little or no purpose. This reservation will not, however, prevent the location and survey of a claim up to the shore line, for in such case the claim will be subject to this servitude and the area in the highway will be computed as a part of the area entered and purchased.

42. It is not deemed advisable at this time to prescribe any fixed form of application for the use of any of the reserved lands between claims entered or purchased under this act, excepting that—

(1) The citizenship of the applicants or association of applicants must be shown, and in the case of a corporation the same showing must be made as is required by paragraph under section two, granting right of way for railroads.

(2) The location of the landings or wharves must be accurately described on a map or diagram with reference to claims on either side.

(3) The use of such lands is limited to landings and wharves, and all rates of toll to be paid by the public must be submitted for approval by the Secretary of the Interior.

Section 11 relates to—

THE TIMBER ON PUBLIC LANDS IN THE DISTRICT OF ALASKA,

and provides:

SEC. 11. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the District of Alaska, and may from time to time sell so much thereof as he may deem proper for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the District of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the District from year to year, and payments for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said District of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

43. While sales of timber are optional, and the Secretary of the Interior may exercise his discretion at all times as to the necessity or advisability of any sale, petitions from responsible persons for the sale of

timber in particular localities will be received by this Department for consideration.

Such petitions must describe the land upon which the timber stands, as definitely as possible by natural landmarks; the character of the country, whether rough, steep, or mountainous, agricultural or mineral, or valuable chiefly for its forest growth; and state whether or not the removal of the timber would injuriously affect the public interests. If any of the timber is dead, estimate the quantity in feet, board measure, with the value, and state whether killed by fire or other cause. Of the live timber, state the different kinds and estimate the quantity of each kind in trees per acre. Estimate the average diameter of each kind of timber, and estimate the number of trees of each kind per acre above the average diameter. State the number of trees of each kind it is desired to have offered for sale, with an estimate of the number of feet, board measure, therein, and an estimate of the value of the timber as it stands.

44. Before any sale is authorized the timber will be examined and appraised. Notice thereof will be given by publication by the Commissioner of the General Land Office.

45. The time and place of filing bids and other information for a correct understanding of the terms of each sale will be given by published notices or otherwise. Timber is not to be sold for less than the appraised value. The Commissioner of the General Land Office must approve all sales, and he may make allotment of quantity to any bidder or bidders if he deems proper. The right is also reserved to reject any or all bids. A reasonable cash deposit, to accompany each bid, will be required.

46. Within thirty days after notice to a bidder of an award of timber to him payment must be made in full to the receiver for the timber so awarded; or equal payments therefor may be made in thirty, sixty, and ninety days from date of such notice, at the option of the purchaser. The purchaser must have in hand the receipt of the receiver for each payment before he will be allowed to cut, remove, or otherwise dispose of the timber covered by that payment. The timber must all be cut and removed within one year from the date of payment therefor; failing to so do, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money: *Provided*, That the limit of one year herein named may be extended by the Commissioner of the General Land Office, in his discretion, upon good and sufficient reasons being shown.

47. Notice must be given by the purchaser to the Commissioner of the General Land Office of the proposed date of cutting and removal of the timber, so that, if practicable, an official may be designated to supervise such cutting and removal. Upon application of purchasers, permits to erect temporary sawmills for the purpose of cutting or manufacturing timber purchased under this act may be granted by the

Commissioner of the General Land Office, if not incompatible with the public interests.

48. No timber taken from the public lands and sold as above prescribed may be exported from the District of Alaska.

49. Special instructions will be issued for the guidance of officials designated to examine and appraise timber, to supervise its cutting and removal, and for carrying out other requirements connected therewith.

50. Actual settlers, residents, individual miners, and prospectors for minerals may procure, free of charge, from unoccupied unreserved public lands in Alaska, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, so much timber as may be actually needed by such persons, for individual use, to an extent not exceeding, in stumpage valuation, $100 in any one year. It is not necessary to secure permission from the Department to take timber from public lands as allowed in this paragraph. The exercise of such privilege is, however, subject at all times to supervision by the Department, with a view to restriction or prohibition if deemed necessary. The uses specified in this paragraph constitute the only purposes for which timber may be taken, free of charge, from public lands in Alaska.

51. In cases arising under the preceding paragraph in which the parties needing the timber are not in a position to procure it from the public lands themselves, it is allowable for them to secure the cutting, removing, sawing, or other manufacture of the timber through the medium of others, agreeing with the parties thus acting as their *agents direct* in taking or otherwise handling the timber that they shall be paid a reasonable amount to cover their time and labor expended and all legitimate expenses incurred in connection therewith *exclusive of any charge for the timber itself.*

52. Section 2461, United States Revised Statutes, is in force in the District of Alaska, and its provisions may be enforced against any person or persons who cut or remove, or cause or procure to be cut or removed, or aid or assist or are employed in cutting or removing, any timber from public lands therein, except as allowed by law.

Section 12 authorizes the establishment of—

LAND DISTRICTS WITHIN THE DISTRICT OF ALASKA,

and provides:

SEC. 12. That the President is authorized and empowered, in his discretion, by Executive order from time to time to establish or discontinue land districts in the District of Alaska, and to define, modify or change the boundaries thereof, and designate or change the location of any land office therein; and he is also authorized and empowered to appoint, by and with the advice and consent of the Senate, a register for each land district he may establish and a receiver of public moneys therefor; and the register and receiver appointed for such district shall, during their respective terms of office, reside at the place desig-

nated for the land office. That the registers and receivers of public moneys in the land districts of Alaska shall each receive an annual salary of one thousand five hundred dollars and the fees provided by law for like officers in the State of Oregon, not to exceed, including such salary and fees, a total annual compensation of three thousand dollars for each of said officers.

Districts have been established with land offices at Sitka, Nulato, and Circle.

Section 13 accords certain—

MINING RIGHTS WITHIN THE DISTRICT OF ALASKA TO NATIVE-BORN CITIZENS OF THE DOMINION OF CANADA,

and provides:

SEC. 13. That native-born citizens of the Dominion of Canada shall be accorded in said District of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said District of Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect.

53. By the laws of the Dominion of Canada citizens of the United States are, with all other persons over 18 years of age, permitted to lease mineral lands in British Columbia and the Northwest Territory upon the payment of a certain royalty to the general government, but the laws of that Dominion do not authorize the purchase of mineral lands in British Columbia or the Northwest Territory.

54. The existing laws of the United States do not make any provision for the leasing of mineral lands in Alaska either to citizens of the United States or to others, but they do provide for and authorize the purchase of such lands in Alaska by our own citizens.

55. Since this section accords to native-born citizens of Canada "the same mining rights and privileges" accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, and since under the laws of the Dominion of Canada the only mining rights and privileges accorded to citizens of the United States are those of leasing mineral lands upon the payment of a stated royalty, and since the laws of the United States do not accord to its own citizens the right or privilege of leasing mineral lands in Alaska, and since this section also provides that "no greater rights shall be thus accorded" to citizens of the Dominion of Canada "than citizens of the United States or persons who have declared their intention to become such may enjoy in such District of Alaska," it results that for the time being this section is inoperative.

The concluding section, fourteen, refers to matters under the jurisdic-

tion of the Treasury Department, as to which nothing need be said in this connection. It reads as follows:

SEC. 14. That under rules and regulations to be prescribed by the Secretary of the Treasury, the privilege of entering goods, wares, and merchandise in bond or of placing them in bonded warehouses at any of the ports in the District of Alaska, and of withdrawing the same for exportation to any place in British Columbia or the Northwest Territory without payment of duty, is hereby granted to the Government of the Dominion of Canada and its citizens or citizens of the United States and to persons who have declared their intention to become such whenever and so long as it shall appear to the satisfaction of the President of the United States, who shall ascertain and declare the fact by proclamation, that corresponding privileges have been and are being granted by the Government of the Dominion of Canada in respect of goods, wares, and merchandise passing through the territory of the Dominion of Canada to any point in the District of Alaska from any point in said District.

BINGER HERMANN,
Commissioner.

DEPARTMENT OF THE INTERIOR, *June 8, 1898.*

Approved:
C. N. BLISS,
Secretary.

APPENDIX.

FORMS FOR DUE PROOFS AND VERIFICATION OF MAPS OF RIGHT OF WAY FOR RAILROADS, TRAMWAYS, WAGON ROADS, ETC.

FORM 1.

I, ——— ———, secretary (or president) of the ——— company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of ———: and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL OF COMPANY.] ——— ———,
—— of the ——— Company.

FORM 2.

STATE OF ———,
County of ———, *ss:*

——— ———, being duly sworn, says that he is the president of the ——— company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

[SEAL OF COMPANY.] ——— ———,
President of Company.

Sworn and subscribed to before me this —— day of ———, 189—.

[SEAL.] ——— ———,
Notary Public.

FORM 3.

STATE OF ———,
County of ———, *ss:*

———— ————, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the ——— company: that the survey of the said company's line of (railroad, tramway, or wagon road) described as follows: (here describe the line of route as required by paragraph 14), a length of ——— miles, was made by him (or under his direction) as chief engineer of (or as surveyor employed by) the company and under its authority, commencing on the —— day of ———, 189–, and ending on the —— day of ———, 189–; that the survey of the said land is accurately represented on this map and by the accompanying field notes; and that this proposed right of way does not lie within 4 rods of the shore of any navigable waters, except as shown on this map. (In the case of a tramway or wagon road, add the following: The said line of road does not lie upon nor cross any road or trail in common use for public travel except as shown on this map.)

———— ————,

———— ————.

Sworn and subscribed to before me this —— day of ———, 189—.
[SEAL.] ———— ————,
Notary Public.

FORM 4.

I, ———— ————, do hereby certify that I am president of the ——— company: that ———— ————, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company: that the survey of the said (railroad, tramway, or wagon road), as accurately represented on this map and by the accompanying field notes, was made under authority of the company: that the company is duly authorized by its articles of incorporation to construct the said (railroad, tramway, or wagon road) upon the location shown upon this map; that the said survey as represented on this map and by said field notes was adopted by resolution of its board of directors on the —— day of ———, 189—, as the definite location of the said (railroad, tramway, or wagon road) described as follows: (describe as in Form 3); that this proposed right of way does not lie within 4 rods of the shore of any navigable waters, except as shown on this map: and that this map has been prepared to be filed in order to obtain the benefits of sections 2 to 9, inclusive, of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes." * I further certify that the said (railroad or tramway) is to be used as a common carrier of freight and passengers.

———— ————,
President of the ——— Company.

Attest:
[SEAL OF COMPANY.] ———— ————,
Secretary.

* The last sentence to be omitted from applications for wagon-road right of way.

FORM 5.

STATE OF ———,
County of ———, *ss:*

——— ———, being duly sworn, says that he is the chief engineer of (or was employed to construct the railroad, tramway, or wagon road of) the ——— company; that said (railroad, tramway, or wagon road) has been constructed under his supervision, as follows: (describe as in paragraph 14) a total length of ——— miles; that construction was commenced on the —— day of ———, 189—, and completed on the —— day of ———, 189—; that the constructed (railroad, tramway, or wagon road) conforms to the map and field notes which received the approval of the Secretary of the Interior on the —— day of ———, 189—.

——— ———.
——— ———.

Sworn and subscribed to before me this —— day of ———, 189—.
[SEAL.]
——— ———,
Notary Public.

FORM 6.

I, ——— ———, do hereby certify that I am the president of the ——— company; that the (railroad, tramway, or wagon road) described as follows: (describe as in Form 5) was actually constructed as set forth in the accompanying affidavit of ——— ———, chief engineer (or the person employed by the company in the premises); that the location of the constructed (railroad, tramway, or wagon road) conforms to the map and field notes approved by the Secretary of the Interior on the —— day of ———, 189—; and that the company has in all things complied with the requirements of sections 2 to 9, inclusive, of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes."

——— ———,
President of the ——— Company.

Attest:
[SEAL OF COMPANY.]
——— ———,
Secretary.

FORM 7.

STATE OF ———,
County of ——— ss:

——— ———, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the ——— company; that the survey of the tract described as follows: (here describe as required by paragraph 14) an area of ——— acres, and no more, was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company), and under its authority, commencing on the —— day of ———, 189—, and ending on the —— day of ———, 189—; that the survey of the said tract is accurately represented on this plat and by the accompanying field notes; *(that

* This clause is to be omitted in applications for terminal or junction grounds.

the company has occupied no other grounds for similar purposes upon public lands within the section of [5 or 10] miles, from the —— mile to the —— mile, for which this selection is made); that in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes;" that the said tract does not lie within 4 rods of the shore of any navigable waters except as shown on this map, and that to the best of my knowledge and belief there is no settlement or other claim along the shore of any navigable waters upon land within 80 rods of any point of this tract except as shown on this map.

——— ———.

——— ———.

Subscribed and sworn to before me this —— day of ———, 189—.

[SEAL.] ——— ———,

Notary Public.

FORM 8.

I, ——— ———, do hereby certify that I am president of the ——— company; that ——— ———, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the tract described as follows: (here describe as in Form 7) an area of ——— acres, and no more, was made by him as chief engineer of (or as surveyor employed to make the survey by) the said company; that the said survey, as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the said survey, as represented on this map and by said field notes, was adopted by resolution of its board on the —— day of ———, 189—, as the definite location of said tract for (station, terminal, or junction grounds); *(that the company has occupied no other grounds for similar purposes upon public lands within the section of [5 or 10] miles, from the —— mile to the —— mile, for which this selection is made); that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes;" that the said tract does not lie within 4 rods of the shore of any navigable waters except as shown on this map, and that, to the best of my knowledge and belief, there is no settlement or other claim along the shore of any navigable waters upon land within 80 rods of any point of this tract except as shown on this map.

———— ————.

President of the ——— Company.

Attest:

[SEAL OF COMPANY.] ———— ————,

Secretary.

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*This clause to be omitted in applications for terminal or junction grounds.

REPAYMENT—DESERT LAND ENTRY.

ADOLPH NELSON.

Repayment cannot be allowed where by mistake in description a desert entry is made and perfected for land not intended to be entered, and in fact not reclaimed, and is subsequently canceled as the result of an unsuccessful application for amendment, it appearing that said mistake was not due to any erroneous action on the part of the government.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 22, 1898.* (C. J. G.)

November 18, 1889, Adolph Nelson made desert land entry for Sec. 5, T. 21 N., R. 3 E., Helena land district, Montana.

December 4, 1890, the final papers in the case were issued, and October 23, 1891, the entry was patented.

January 16, 1892, Nelson made application to amend his entry so as to embrace land in Sec. 5, T. 22 N., R. 3 E., at the same time relinquishing the patent issued for the land in township 21. His explanation of this request, as set out in your office decision of June 7, 1892, is as follows:

The statement of the applicant, fully corroborated, is to the effect that in June and July 1889 he commenced the erection of a fence inclosing sec. 5, Tp. 22 N., R. 3 E., with the intention of reclaiming the tract under the desert land laws; that being unfamiliar with public surveys he secured the services of a surveyor to obtain the proper description of the land, and made his entry in accordance with the description given him; that by a late report of the road supervisor of Cascade county, he accidentally found that the land he had reclaimed was sec. 5, Tp. 22 N., R. 3 E.; that he had a fence around the entire section, a house thereon, besides reservoirs and ditches, and when he went to the land office to see about changing his entry he learned for the first time that said section was reserved under the act of Oct. 2, 1888, as the Benton Lake reservoir site No. 10; that the SE. corner of section 5 Tp. 22 N., 3 E., is the lowest point on the tract reclaimed and that point is fully one and one-eighth miles northwesterly from the water level of Benton Lake, and it is impracticable, if possible to irrigate the land with the waters of said lake; that he has reclaimed and improved said land in good faith, not knowing that the same was not subject to entry, as he believed he had entered it, and that the land described in his entry is worthless and unfit for reclamation.

Your office denied the application to amend, the records showing that all of Sec. 5, T. 22 N., R. 3 E., was withdrawn for permanent reservoir sites, under instructions from this Department dated July 26, 1889, in accordance with the provisions of the act of October 2, 1888 (25 Stat., 527), and therefore not subject to entry at the time Nelson made his entry.

April 27, 1893, the Department, on appeal, affirmed your said office decision of June 27, 1892.

August 16, 1893, Nelson's entry was canceled in accordance with said departmental decision.

October 27, 1894, said Adolph Nelson sold, assigned and transferred all his right, title and interest in and to said land in township 21 to

Elida M. Nelson, who applied to your office for repayment of the purchase money paid for the land.

November 21, 1894, your office held that, as the entry was not erroneously allowed by the government (inasmuch as the proofs were proper and sufficient on their face), as it was not canceled for conflict, and as the government was in no way responsible for the mistake of the entryman in making his improvements upon land other than that which he had entered, there was no authority under the law for repayment of the purchase money.

No appeal was taken by the applicant from your said office decision, for the alleged reason that "he was unaware at the time of the rejection of his application of his right of appeal." He, however, applied to the Department for a writ of certiorari, which was denied August 8, 1896, under authority contained in the case of Smith *v.* Noble, 11 L. D., 558.

December 15, 1896, Adolph Nelson made application for repayment of the purchase money paid on his entry, which was denied by your office January 2, 1897, for the same reasons that Elida M. Nelson's application was refused. The said Adolph Nelson has now appealed to this Department, it being contended that your office erred in holding that his entry was not erroneously allowed in contemplation of the act of June 16, 1880 (21 Stat., 287). He claims that the mistake in making improvements upon land other than that included in his entry was caused by the surveyor who located the lines of his claim for him, whereby he irrigated and cultivated land in another section.

The Department has held that the words "erroneously allowed," employed in the repayment statute, clearly refer to an act of the government (Christopher W. McKelvey, 24 L. D., 536), and that the purpose of said statute is to reimburse one for money paid as the purchase price for land, only when, for some reason not within the control of the entryman, title to the land can not be passed by the government (John C. Angell, 24 L. D., 575). The entryman herein admits that the mistake in improving the wrong land was due to the surveyor employed by him; the error is not, therefore, chargeable to the government, as the entry was properly allowed upon the proofs presented. In the case of William E. Creary, 2 L. D., 694, followed in that of Christopher W. McKelvey, *supra*, and which is similar to the case under consideration, it was said:

> These affidavits do not support applicant's allegation that the government is responsible for his error. They show as you suggest that an erroneous survey by the Gila Bend Canal Company, and not any mistake in the government survey, led applicant and others to purchase particular lands.
>
> Had the mistake resulted from any erroneous action on the part of the government, then clearly the act of June 16, 1880, would afford the relief desired.
>
> On the facts as they appear, however, while there seems to be an equity in favor of the applicant, I am unable to find in the law anything which would authorize repayment as asked. . . . . The words "erroneously allowed" clearly refer to an act of the government.

Under the circumstances as herein set forth the only relief that could at any time have been afforded the entryman was to allow him to amend his entry; but as has been seen that was impracticable because the land he desired to include in the amended entry, and which he actually cultivated and improved, was withdrawn for reservoir purposes at the time he made his entry for land in township 21. There is no provision of the repayment statute authorizing the return of his purchase money.

Your office decision is hereby affirmed.

RAILROAD GRANT—FORFEITURE—ACT OF APRIL 14, 1896.

SCANLON *v.* NEW ORLEANS PACIFIC RY. CO.

The act of July 14, 1870, forfeiting the grant of June 3, 1856, in aid of the New Orleans and Opelousas road, operated to restore lands embraced in said grant and certified thereunder to the public domain without a formal act of conveyance on the part of the State; and, after such statutory restoration, the right acquired by said certification was no bar to the selection of indemnity lands by the New Orleans and Pacific.

The right of entry under section 2, act of February 8, 1887, asserted by an assignee, must be denied if it appears that his assignor was not entitled thereto.

The act of April 14, 1896, authorizing the New Orleans Pacific to relinquish lands within its indemnity limits in favor of settlers, and to select other lands in lieu thereof, is a privilege conferred upon the company which it may exercise at its pleasure, and confers no authority upon the Department to dispose of such lands to settlers without the consent of the company.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 22, 1898.* (E. F. B.)

December 10, 1895, John P. Scanlon applied to make homestead entry of the SE. ¼ of Sec. 3, T. 7 S., R. 2 E., New Orleans, Louisiana, which was rejected for the reason that the decision of the Department of September 28, 1895, in the case of M. C. Scanlon *v.* New Orleans Pacific Railway Company, rejecting the application of M. C. Scanlon to make timber culture entry of said tract, and holding that it was subject to selection by the railway company as indemnity, was a final adjudication of the right of the company to make selection thereof.

The action of the local officers was affirmed by your office by decision of June 26, 1896.

John P. Scanlon appealed from both decisions in due time, alleging, substantially, error in rejecting his application without ordering a hearing to determine his right, under the act of February 8, 1887 (24 Stat., 392), as assignee of a settler who settled on said tract prior to December 28, 1883, and in not awarding the land to him under the act of April 14, 1896 (29 Stat., 91).

This tract is within the indemnity limits of the grant to the New Orleans Pacific Railway Company, and was selected as indemnity by said company December 28, 1883. It had prior to this, to wit, October

7, 1859, been certified to the State of Louisiana under the grant of June 3, 1856 (11 Stat., 18), to aid in the construction of the road from New Orleans by Opelousas to the State of Texas, which was forfeited by the act of July 14, 1870 (16 Stat., 277), and on February 24, 1888, the State of Louisiana made a formal reconveyance of said lands to the United States.

The forfeiture of said grant restored said lands to the public domain, without the formal act of conveyance by the State, and hence the right that had been acquired by said certification was no bar to the selection of said tract by the New Orleans Pacific Railway Company December 28, 1883. New Orleans Pacific Ry. Co., 14 L. D., 321; New Orleans Pacific Ry. Co. *v.* Sancier, 14 L. D., 328.

John P. Scanlon claims the right to enter this tract as assignee of his mother, Mary Lynch, who was the widow of M. C. Scanlon, under the proviso to the 2d section of the act of February 8, 1887, *supra*. With his application he filed a copy of a deed from the said Mary Lynch, conveying to him all the right, title and interest of her deceased husband, including the improvements thereon, accompanied by certified copies of affidavits to show settlement and improvements upon the tract prior to selection by the railroad company.

As John P. Scanlon claims the right to enter said tract as assignee of M. C. Scanlon, he can have no better right than his assignor, and it is necessary to show that M. C. Scanlon was entitled to the benefit of the proviso to the 2d section of the act of February 8, 1887.

This tract of land was in controversy before the Department in the case of M. C. Scanlon *v.* New Orleans Pacific Railway Company, which involved the right of M. C. Scanlon to enter said tract under the provisions of said act of February 8, 1887, and was decided adversely to Scanlon February 3, 1893 (unreported). A motion for review of said decision was denied September 28, 1895.

In that decision every question presented by this application, so far as it involved the right of M. C. Scanlon to enter said tract under the proviso to the 2d section of the act of February 8, 1887, was disposed of.

When M. C. Scanlon tendered his application to make timber culture entry of said tract, he filed in support of it an affidavit, alleging that he had the entire tract under fence and more than one hundred acres under cultivation. Upon these allegations a hearing was ordered, but the Department held that there is nothing to show that Scanlon, or any one through whom he claims, was in possession of this land claiming the same under the settlement laws at the time of the company's selection.

In support of the motion for review and application for a rehearing, affidavits were filed, to the effect that Scanlon was residing on the adjoining land in 1876, and during that year had constructed a ditch, which drained the land in controversy; that in 1887 he fenced a part

of the land with his adjoining land, and in 1889 included the whole tract in his fence, which tract he afterwards cultivated.

It was also shown that one McCoy claimed part of the land which he fenced and improved, and afterwards sold to the wife of M. C. Scanlon.

This application is supported alone by these affidavits, and it is practically an application to have the case readjudicated upon the same testimony to determine his right as assignee that was before the Department in the case of M. C. Scanlon, when it was held that the proviso to section 2 clearly defines the character of persons in whose favor the exception is made, and that the affidavits filed in support of the motion for rehearing did not show that Scanlon or any one through whom he claims was in possession of this land claiming the same under the settlement laws when the company's selection was made.

The act of April 14, 1896, 29 Stat., 91, authorizing the New Orleans Pacific Railway Company to relinquish lands within its indemnity limits in favor of settlers, and to select other lands in lieu thereof, is a privilege conferred upon the company which it may exercise at its pleasure, and confers no authority upon the Department to dispose of such lands to settlers without the consent of the company.

As J. P. Scanlon can have no better right than his assignor, the decision of your office rejecting his application is affirmed.

CIRCULAR.

EXPORT OF PUBLIC TIMBER FROM WESTERN WYOMING INTO IDAHO.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 23, 1898.

1. The act of Congress, approved July 1, 1898, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," provides as follows: "That section eight of an Act entitled 'An Act to repeal the timber culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended as follows: That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of the eighth section of the act of March third, eighteen hundred and ninety-one, to citizens of Idaho and Wyoming to cut timber in the State of Wyoming west of the continental divide, on the Snake River and its tributaries to the boundary line of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho.

2. Under the authority vested in the Secretary of the Interior by the above cited act of July 1, 1898, the following amendment to the Rules and

Regulations issued March 17, 1898 (26 L. D., 399), under the said act of March 3, 1891 (26 Stat., 1093), is hereby prescribed and promulgated:

The restriction contained in said Rules and Regulations of March 17, 1898, confining the use of timber cut thereunder to the State in which the same is cut, is so far modified as to allow citizens of Idaho and Wyoming to cut timber in the State of Wyoming west of the continental divide, on the Snake River and its tributaries to the boundary line of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho.

BINGER HERMANN,
Commissioner.

Approved, July 23, 1898,

THOS. RYAN,
Acting Secretary.

CÆSAR *v.* SALES.

Motion for re-review denied by Secretary Bliss July 26, 1898. See departmental decisions of February 12, 1898, 26 L. D., 190, and 604.

OKLAHOMA LANDS—QUALIFICATIONS OF ENTRYMAN.

BYERS *v.* ALLISON.

One who at the hour of opening is within the Territory, engaged by authority in the survey of a townsite, is disqualified by such presence from making the run on the day of opening, but not necessarily disqualified from thereafter entering lands in said Territory, if by such presence therein he secured no advantage over others.

Secretary Bliss to the Commissioner of the General Land Office, July 26, 1898.

(W. V. D.) (L. L. B.)

Lots 3 and 4 and the S. ½ of the NW. ¼, Sec. 3, T. 14 N., R. 4 E., Guthrie, Oklahoma Territory, were opened to settlement, by the proclamation of the President, at noon of September 22, 1891. Sometime afterward (date not given in your office decision) James H. Hamilton made homestead entry therefor.

March 12, 1892, the defendant herein, William H. Allison, bought Hamilton's relinquishment for $450, and Hamilton's entry was canceled and Allison made entry of the same.

April 25, 1895, Charles A. Byers brought contest against said entry of Allison, charging that he was disqualified to make entry for the reason that he was in the territory opened to settlement at the hour of opening, in violation of the proclamation.

The case was set for hearing October 23, 1895, and was that day submitted upon an agreed statement of facts, in substance following:

That on the day of the opening Allison was assisting, by commission

of the governor of Oklahoma, in the survey of the townsite of Chandler, which was not concluded until the 27th of September, 1891; that he did not make the race for land nor any attempt, on the day of the opening, to secure a claim, and never was on the land in controversy until sometime in February, 1892, a short time prior to buying Hamilton's relinquishment; that he gained no advantage by his presence in the territory, and that there was no collusion between him and Hamilton regarding said land. It was also agreed that his improvements were worth about $1100.

The above statement, except as to his improvements, was submitted in a supplemental affidavit filed with his entry papers in 1892. Upon these facts the local officers sustained the contest and held Allison disqualified to make entry.

Allison appealed, and by your office decision of July 3, 1896, the action of the local office was reversed.

September 19, 1896, Byers moved a review of your said office decision, which motion was sustained by decision of your office of November 11, 1896, from which decision on review Allison has appealed to the Department.

This case is controlled by that of Hershey *v.* Bickford *et al.*, 23 L. D., 522, wherein it is said (syllabus):

A person who at the hour of opening Oklahoma lands to settlement is rightfully on reserved land within said Territory . . . . . is by reason of such presence disqualified from making the run on the day of opening, but is not necessarily disqualified from thereafter making entry of lands in said Territory, if by his presence therein he secured no advantage over others.

The decision appealed from is reversed, and the contest of Byers is dismissed.

John S. Smith.

Motion for review of departmental decision of May 10, 1898, 26 L. D., 637, denied by Secretary Bliss, July 27, 1898.

PRIVATE CLAIM—SMALL HOLDING—HOMESTEAD.

Cantrel *v.* Burruss.

A homestead entry made when the land embraced therein is covered by a "small holding" claim, duly filed with the surveyor general and on which proof is subsequently submitted, is invalid and must be canceled.

Secretary Bliss to the Commissioner of the General Land Office, July 27,
(W. V. D.) *1898.* (F. C. D.)

Elie A. Cantrel has appealed from the decision of your office in the case of Elie A. Cantrel *v.* Frederick Burruss, wherein your office

reversed the decision of the local office and held for cancellation Cantrel's homestead entry, made May 16, 1895, for lot 4 and the SE. ¼ of the SW. ¼ of Sec. 7. T. 9 N., R. 3 E., Santa Fe, New Mexico, land district, in so far as the same conflicts with the "small holding" claim of Frederick Burruss.

On May 16, 1895, the same day Cantrel made his said homestead entry, he relinquished his timber-culture entry, made January 26, 1887, for the same tracts.

It appears from the record that on March 2, 1893, Frederick Burruss filed his "small holding" claim, No. 1257, with the United States surveyor-general for New Mexico, at Santa Fe, New Mexico, under the provisions of sections 17 and 18 of the act of March 3, 1891 (26 Stat., 854), entitled, "An Act to establish a Court of Private Land Claims, and to provide for the settlement of private land claims in certain States and Territories," as amended by the act of February 21, 1893 (27 Stat., 470); that on February 4, 1896, Burruss filed his proof on his said claim, which proof was "suspended on protest of Elie A. Cantrel, filed January 10, 1896"; and that on June 3, 1896, the said proof was by the local officers rejected as to that part in S. ½ SW. ¼ and S. ½ SE. ¼, Sec. 7, and S. ½ SW. ¼, Sec. 8, as existing entries covered those tracts at date of act March 3, 1891, and land therein was not subject to appropriation as a small holding claim.

Your office, on appeal, found that patents had issued for the land in said section eight, embraced in the said claim of Burruss, and therefore, as to that land, your office was without jurisdiction; and from that holding Burruss has not appealed.

As to that part of the said claim of Burruss that conflicts with the homestead entry, your office held that when Cantrel

relinquished his timber-culture entry he lost all rights thereunder and initiated a new claim under the homestead law. At that date the claim of Mr. Burruss had been filed with the surveyor-general, as provided by law, a survey of the tract claimed had been duly made and approved, and the lands covered thereby were not subject to entry.

The protest of Cantrel was then dismissed.

The plat of the township embracing the land in controversy was filed in July, 1881. The survey of Burruss' claim was made in 1894.

Said section seventeen of said act of March 3, 1891, was amended by the act of February 21, 1893 (27 Stat., 470), so as to read as follows:

That in the case of townships heretofore surveyed in the Territories of New Mexico, Arizona, and Utah, and the States of Colorado, Nevada, and Wyoming, all persons who, or whose ancestors, grantors, or their lawful successors in title or possession, became citizens of the United States by reason of the treaty of Guadalupe Hidalgo, or the terms of the Gadsden purchase, and who have been in the actual continuous adverse possession of tracts, not to exceed one hundred and sixty acres each, for twenty years next preceding such survey, shall be entitled, upon making proof of such facts to the satisfaction of the register and receiver of the proper land district, and of the Commissioner of the General Land Office, upon such investigation as is provided for in section sixteen of this act, to enter without payment of purchase

money, fees, or commissions such subdivisions, not exceeding one hundred and sixty acres, as shall include their said possession

After a claim of the character described shall have been filed as directed in section eighteen of this act, and it shall appear that a tract claimed as aforesaid is of such shape that the claimant can not readily secure his interests by an entry by legal subdivisions of the public surveys, the Commissioner of the General Land Office may cause such claim to be surveyed at the expense of the United States, but the deputy surveyor performing the work shall not be paid for his services more than five dollars per day in addition to his necessary expenses.

Before commencing such a survey the deputy surveyor shall post, in at least three prominent places in the township in which such claim is situated, a notice in both the English and Spanish languages, calling on all persons entitled to lands in said township under this section, to submit to him within a reasonable time proofs of their rights in the lands, by affidavit or otherwise. He shall then proceed to establish the lines of such possessions in the township as seem to him to be valid, properly connecting the lines thereof with the lines of public surveys, and he shall return the aforesaid proofs to the surveyor-general with the field notes of such claims and possessions. The surveyor-general shall then, upon his approval of said proofs and field notes of surveys, cause the said claim or claims to be platted, and numbered as a lot or lots of the section or sections in which such claim or claims are situated, and shall transmit a duplicate of the amended plat to the General Land Office and a triplicate thereof to the proper district land office, after which the land claimed as aforesaid may be entered as a lot or lots by the number or numbers designated upon the amended township plat:

Provided, however, That no person shall be entitled to enter more than one hundred and sixty acres in one or more tracts in his own right under the provisions of this section.

Section eighteen of the said act of March 3, 1891, as amended by said act of February 21, 1893, provides that all claims arising under sections sixteen and seventeen of this act shall be filed with the surveyor-general of the proper State or Territory within two years next after the first day of December, 1892; that no claim not so filed shall be valid; that the class of cases provided for in said sections 16 and 17 shall not be considered or adjudicated by the court created by this said act; and that no tract of such land shall be subject to entry under the land laws of the United States.

The claim of Burruss and the proof thereon appear to have been regularly filed and made, under the provisions of the said act, and as Cantrel's said homestead entry was made when the claim of Burruss was on file, as above stated, and when, under the provisions of section eighteen of said act, the land in controversy was not subject to entry under the land laws of the United States, the said homestead entry is invalid and is hereby canceled.

Your said office decision is affirmed, and the proof of Burruss is herewith returned for appropriate action under the provisions of said act, with a view to entering the said claim.

RULES AND REGULATIONS FOR MAKING SELECTIONS IN THE TERRITORY OF NEW MEXICO, UNDER THE ACT OF JUNE 21, 1898.

Commissioner Hermann to Registers and Receivers, U. S. Land Offices, New Mexico, July 20, 1898.

The following rules and regulations are prescribed for making selections of land in the Territory of New Mexico, under the provisions of the act of Congress, approved June 21, 1898 (Public No. 150), entitled "An Act to make certain grants of land to the Territory of New Mexico, and for other purposes."

Section 1 of the act provides:—

That sections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and where such sections, or any parts thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any act of Congress, other non-mineral lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said Territory for the support of common schools, such indemnity lands to be selected within said Territory in such manner as is hereinafter provided: *Provided*, That the sixteenth, and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants of this act; but such reservations shall be subject to the indemnity provisions of this act.

1. Under the provisions of said section, where either of the sections 16 or 36, or any part thereof, are mineral, or have been sold or otherwise disposed of in the manner indicated, the Territory will be entitled to select an equal quantity of land in lieu thereof. The selections must be made of surveyed agricultural, non-mineral lands, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, according to the approved township plats on file at the time.

2. The selections are to be made by the governor of the Territory of New Mexico, the surveyor general and the solicitor general of said Territory, acting as a commission, but the actual location of the land may be made by an agent of said commission under the direction of the Secretary, evidence of whose right so to act must be filed in the local offices and in this office.

3. No selection is admissible of lands to which a valid claim has attached, nor of any land which is, or may be, reserved from sale by any law of Congress, or proclamation of the President of the United States, nor of land which is reserved or withdrawn from market for any purpose, nor of mineral land. The character of the selected lands will be determined under the rules existing as to agricultural land entries. In all cases the selected tracts must be covered by non-mineral affidavits made by the duly appointed locating agent, or by an agent appointed by the locating agent for that purpose, and if by the latter, evidence of his appointment should accompany the affidavits. A non-

mineral affidavit can be sworn to only on personal knowledge, and cannot be made on information and belief.

4. In all indemnity selection lists, the selected tracts on the one side must be connected with specific bases of exactly the same quantity on the other side. Respecting the method of so balancing the selections, you are referred to the circular letter from this office of July 29, 1887, page 124 of the Commissioner's annual report for 1887, which was sanctioned by the Department in the case of Melvin *et al. v.* California (6 L. D., 702).

5. In presenting selections of indemnity lands, based on sections sixteen and thirty-six or portions thereof, found upon survey to be in the occupancy and covered by the improvements of an actual settler under the public land laws, whose settlement was made before the survey of the land in the field, the Territory may proceed in one of two ways to have its rights defined:

First. By proving such occupation at the date of survey, and up to the time of the selection, by the testimony of at least two respectable disinterested witnesses. In such instances the qualifications of the alleged settler under the public land laws must be shown and also the occupancy and improvements as to each subdivision used as the basis of selection.

Second. By relying on the proofs of settlers under the public land laws claiming by virtue of settlement prior to survey, after entry by them. The validity of such basis of selection would depend upon the establishment of the fact of such settlement before this Department.

6. In making selections founded on deficiencies in the school sections the bases should be carefully described in the lists of selections, by subdivisions, section, township, and range, or by fractional townships, where the school sections are entirely wanting.

7. A determination by the Secretary of the Interior, or a decision by his office, or by the local officers, which has become final under the Rules of Practice, that a portion of the smallest legal subdivision in a section numbered 16 or 36 is mineral land will place said entire subdivision in the class of bases that may be used in selections of land as indemnity.

8. All lands in said sections 16 or 36, returned as non-mineral, must be presumed to be school lands, for the purposes of the act, until the presumption is overcome in the manner hereinafter indicated; and, likewise, the return of sections 16 and 36 by the surveyor-general as mineral land is sufficient evidence of its mineral character to entitle the Territory to select indemnity therefor, in all cases where said return is not overcome by competent evidence to the contrary.

9. In the absence of a decision by this Department that land in a school section is either mineral or non-mineral in character the Territory may proceed as follows:

(a) By proceeding to prove land which has been returned as mineral

to be in fact non-mineral, in the manner prescribed in Mining Circular of December 15, 1897 (25 L. D., 592).

(b) By relying upon the record for indemnity where lands have been entered as mineral. Where the authorities have information that the mineral character of tracts in sections 16 and 36 is shown by evidence in this office, a list thereof may be sent here through the proper district office, to determine whether they may be used as bases for selections.

10. The remaining grants made by the act are as follows, and the rules prescribed in numbered paragraph 3, are also applicable to the selection of these:

(a) By section 2 there are granted for the purpose of erecting public buildings at the capital, for legislative, executive and judicial purposes, 50 sections (32,000 acres).

(b) Section 3 grants to the Territory the lands reserved for the establishment of a University in New Mexico under section 6 of the Act of July 22, 1854 (10 Stats., 308), viz: two townships (46,080 acres), and provides that any portion thereof remaining unselected may now be selected. In addition to the foregoing there are granted for the use of said university 65,000 acres of non-mineral, unappropriated and unoccupied public land, and all the saline lands in said Territory; and 100,000 acres of non-mineral, unappropriated and unoccupied lands for the use of an agricultural college.

(c) In lieu of the grant for internal improvements under section 8, of the act of September 4, 1841 (5 Stats., 455), and also in lieu of any claim for swamp and overflowed lands, section 6 of the act provides for a grant of the following amounts of non-mineral and unappropriated land for the purposes specified, viz:

	Acres.
Water reservoirs, for irrigating purposes	500,000
Improvement of the Rio Grande in New Mexico	100,000
Insane Asylum	50,000
School of Mines	50,000
Deaf and Dumb Asylum	50,000
Reform School	50,000
Normal Schools	100,000
Institute for the Blind	50,000
Miner's Hospital	50,000
Military Institute	50,000
Penitentiary	50,000

11. The saline lands granted by section 3 of the act must be selected in the same manner as agricultural lands, and all selections of saline lands must be accompanied with satisfactory evidence that lands so selected are in fact saline in character, the bare return by the surveyor general of land as saline will not be considered as conclusive in classifying them as saline, the returns of the deputy-surveyors as to the character of the land surveyed having been found in many instances to be indefinite or erroneous.

12. Section 10 of said act provides:

First. For the leasing of the lands reserved for "university purposes, including saline lands, and section 16 and 36, reserved for school purposes."

Second. For the sale of "the remainder of the lands granted by this act except those lands which may be leased only as above provided," or for their leasing when provided for by the legislative assembly of the Territory.

Third. That "all leases made under the provisions of this act shall be subject to the approval of the Secretary of the Interior, and all investments made or securities purchased with the proceeds of sales or leases of lands provided for by this act shall be subject to like approval by the Secretary."

Under the provisions of this section all leases of lands whether of lands "reserved for university purposes, including all saline lands and sections sixteen and thirty-six reserved for school purposes;" or of "the remainder of the lands granted by this act, except those lands which may be leased only as above provided," when the leasing of such remaining lands may have been provided for by the legislative assembly of the Territory, and all investments made or securities purchased with the proceeds of sales or leases of such lands must be submitted to the Secretary of the Interior for his approval.

13. All lists of selections under the several grants should have a regular, but separate and distinct series of numbers commencing with number one.

14. The fees required by the seventh proviso of section 2238 U. S. R. S. must in every instance accompany all lists of selections, except for agricultural colleges, and the payment of the fees must be noted on the several lists.

Approved:

C. N. BLISS,
Secretary.

TERRITORIAL SELECTIONS—FEES—NEW MEXICO.

INSTRUCTIONS.

In making selections under the act of June 21, 1898, the fees required by law to be paid to the register and receiver should be paid by the Territory, and not from the appropriation made in section 11, of said act.

Secretary Bliss to the Commissioner of the General Land Office, July 26, 1898.
(W. V. D.) (J. I. P.)

I am in receipt of your office letter of the 20th instant, asking instructions relative to the administration of the act approved June 21, 1898 (Public No. 150), making grants of various bodies of public lands to the Territory of New Mexico, in so far as said act relates to the

expenditure of the appropriation of $10,000 made by section 11 thereof. You ask:

In view of the foregoing, I have to respectfully ask for instruction whether any portion of the ten thousand dollars appropriated will be available for the payment of fees, or whether such fees must be paid by the Territory, and the appropriation used exclusively for the payment of the expenses and compensation of the commission and its employes. If the former, I would further ask whether this office shall proceed to administer the grant to the extent of the appropriation, or suspend action until the attention of Congress can be called to the fact that the appropriation is inadequate for the purpose of carrying out the provisions of the act.

The "fees" referred to are those to be paid to the registers and receivers; namely, "one dollar for each final location of one hundred and sixty acres," (except for agricultural colleges) as required by section 2238 Revised Statutes, and mentioned in paragraph 14 of the circular approved July 20, 1898 (27 L. D., 281), which is as follows:

The fees required by the seventh proviso of section 2238 U. S. R. S. must in every instance accompany all lists of selections, except for agricultural colleges, and the payment of the fees must be noted on the several lists.

The appropriation in question was made "for the purpose of paying the expenses of the selection and segregation of said respective bodies of land," including compensation to the commission provided for in the act.

It is apparent from a brief computation, that the "fees" referred to, if considered as part of the "expenses" provided for in the appropriation, would require for their payment alone a greater amount of money than the $10,000 appropriated. This was manifest to Congress when the act was passed, and in view thereof, and of the compensation to the commission expressly enumerated as part of the "expenses" provided for in the appropriation, and for the further well known fact that there are always large expenses, strictly so called, attending the selection and location of lands under such grants, it can hardly be considered as within the intention of Congress that the "fees" to the local officers should be paid out of the amount of money appropriated.

Moreover, in the case of the Territory of Oklahoma (26 L. D., 536), it was held, in regard to the fees provided for in section 2238 of the Revised Statutes, which are similar to those under consideration, that the Territory was required under said section to pay said fees. The Department knows of no reason for making a distinction between the Territory of New Mexico and the Territory of Oklahoma, in the matter of the payment of said fees, or for applying a rule to the one, that should not be applied to the other. The act of Congress not expressly requiring a different rule as to New Mexico, the same rule must be applied to it as in other cases.

It is therefore the opinion of this Department that the fees required by law to be paid the register and receiver should be paid by the Territory, and that no part of the appropriation of $10,000 should be subjected to that expense.

You are therefore directed to proceed to administer the grant to said Territory under the act of June 21 (*supra*), in accordance with the views herein expressed.

RAILROAD GRANT—LAND EXCEPTED—MINING CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* ALLEN ET AL.

Non-mineral land is not excepted from the grant to the Northern Pacific by reason of a "claim" thereto under the mining laws, unless the claim is one which has been asserted before the local land office, and is pending of record there, at the time the line of the road is definitely fixed.

Secretary Bliss to the Commissioner of the General Land Office, August 2, 1898.
(W. V. D.)

The Northern Pacific Railroad Company has appealed from your office decision of September 6, 1892, holding that certain lands, portions of Sec. 27, T. 10 N., R. 3 W., Helena land district, Montana, embraced in the homestead applications of M. F. Allen, Charles S. Jackman, Leslie Sulgrove, and Zachary T. Burton, were excepted from its grant, made by the act of July 2, 1864 (13 Stat., 365).

This section is within the primary limits of the grant as adjusted to the line of road as definitely located July 6, 1882.

The section was listed by the company preliminary to patent on July 28, 1886.

The above-named homestead applicants are severally contesting the company's claim to the parts of said section hereinafter described and by stipulation the cases have been consolidated and submitted upon the following agreed statement of facts:

First. That service of further notice of the pendency of this action is hereby waived.

Second. It is hereby stipulated and agreed by and between the parties hereto that the land embraced in this contest, viz., NW. ¼ of NE. ¼, E. ½ of NW. ¼, NW. ¼ of NW. ¼, of Sec. 27, T. 10 N., R. 3 W., is within the limits of the grant to the Northern Pacific Railroad Company, a part of an odd numbered section, and was selected by said railroad company and is a part of railroad selection No. 11, Helena land district.

Third. That on the 29th day of March, 1880, said tract of land was located under the mining laws of the United States as placer mining land, by Albert Kleinschmidt *et al.*, citizens of the United States duly qualified to enter said lands, and that said locations were duly recorded in the office of the county clerk and recorder of Lewis and Clarke county, Montana, on said 29th day of March, 1880.

Fourth. That said placer mining locations were duly represented by having not less than one hundred dollars annually expended on each of the same by said placer mining claimants during the years of 1881, 1882, 1883, and 1884.

Fifth. That said placer mining claimants were in possession of and claiming said land on the sixth day of July, 1882, under the mining laws of the United States.

Sixth. That a certified copy of each of said mining locations shall be filed herewith.

Seventh. It is hereby stipulated and agreed by and between the parties hereto that this agreed statement of facts shall refer also to the cases of Charles S. Jackman *v.* N. P. R. R. Co., pending in said U. S. Land Office and embracing the E. ½ of NE. ¼, SW. ¼ of of NE. ¼, and NE. ¼ of SE. ¼ of said section 27, T. 10 N., R. 3 W. And also

the case of Leslie Sulgrove *v.* N. P. R. R. Co., for the NW. ¼ of SE. ¼, and NE. ¼ of SW. ¼ of said section. Also the case of Zachary T. Burton *v.* N. P. R. R. Co., involving the the S. ½ of SE. ¼, S. ½ of SW. ¼ of said section. The facts relating to these four cases being identical, the same shall be consolidated and tried as one case upon the foregoing statement of facts. Due notice by the land officers shall be given and right of appeal allowed.

Eighth. It is hereby stipulated and agreed that the work performed by said mineral locators upon said land ascertained and determined that said land did not contain mineral sufficient to pay for working thereof, but that said land was more valuable for agricultural than for mineral purposes.

Ninth. That service of notice of the application of said Leslie Sulgrove to enter the NW. ¼ of SE. ¼ and the NE. ¼ of SW. ¼ of said section, is hereby waived. And it is hereby stipulated and agreed that objections shall be deemed to have been taken and filed by said railroad company to the allowance of said application to enter, upon the same grounds as are set forth in the objections filed by said company to the allowance of the application of said Charles S. Jackman to enter the E. ½ of NE. ¼, SW. ¼ of NE. ¼ and NE. ¼ of SE. ¼ of said section 27, township 10 north of range 3 west.

The local officers held, that as the land was admitted to be agricultural in character the mineral locations thereof made by Kleinschmidt *et al.* were of no effect and did not operate to except the land from the grant to the railroad company.

Upon appeal, your office decision of September 6, 1892, reversed the local officers and held the land to be excepted from the grant.

The lands granted to the Northern Pacific Railroad Company (13 Stat., 365), are:

every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States, have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. *Provided, further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road may be selected as above provided:

In the case at bar the stipulation shows—

that the work performed by said mineral locators upon said land ascertained and determined that said land did not contain mineral sufficient to pay for working thereof, but that said land was more valuable for agricultural than for mineral purposes.

The land being agricultural in character, and not mineral, is of the class embraced in the grant and passed to the company upon the definite location of the road unless otherwise excepted by the terms of the grant. It is well established that agricultural land can not be appro-

priated, or rights therein acquired, by the attempted location thereof as mineral land, and yet, notwithstanding the confessed non-mineral character of the land here in controversy, the question remains whether the location thereof in 1880, under the mining laws, followed by the possession of the locators and the requisite annual expenditure up to the time of the definite location of the road, constituted a "claim" to the land within the meaning of that provision in the granting act which excepts from the grant all lands not "free from preemption, or other *claims* or rights at the time the line of said road is definitely fixed." Had the land contained valuable mineral deposits it would for that reason have been excepted from the grant and the location thereof under the mining laws would have conferred upon the locators property rights of the highest character, but in fact they obtained no lawful claim or right to the land under their locations because the land was not mineral and therefore was not subject to the operation of the mining laws.

In Northern Pacific Railroad Co. *v.* Sanders (166 U. S., 620), it was held that an application for patent conforming to the mining laws of the United States and pending in the local land office at the date of the definite location of the road, constituted a "claim" within the meaning of the grant to that company and excepted therefrom the land embraced in such application even though it be non-mineral in quality. In that case, however, an application for patent conforming to the mining laws had been filed in the local land office, entered on the records thereof by the local officers and was being prosecuted by the mineral claimants at the time when the line of road was definitely fixed, and the "pendency of record" of this application or claim is emphasized throughout the opinion; while in the case at bar no application for patent was ever made and no action or proceeding of any character was taken or initiated before the local land office disclosing an intention to assert or obtain title under the mining laws.

A careful examination of the Sanders case seems to show that to except non-mineral land from this grant by reason of a claim thereto under the mining laws, the claim must be one which has been asserted before the local land office and is pending of record there at the time the line of the road is definitely fixed. This view also receives some support from the cases of Kansas Pacific Railway Co. *v.* Dunmeyer (113 U. S., 629); Hastings and Dakota Railroad Co. *v.* Whitney (132 U. S., 357); Whitney *v.* Taylor (158 U. S., 85), and Northern Pacific Railroad Co. *v.* Colburn (164 U. S., 383).

For the reasons given the decision of your office is reversed and that of the local office affirmed.

MURPHY *v.* MURPHY ET AL., TAYLOR AND ALLEN, INTERVENORS.

Motion for review of departmental decision of May 26, 1898, 26 L. D., 703, denied by Secretary Bliss, August 2, 1898.

WILLIAMS *v.* WINGATE.

Motion for review of departmental decision of March 29, 1898, 26 L. D., 433, denied by Secretary Bliss, August 2, 1898.

SCHOOL LAND—HOMESTEAD CLAIM—MINING CLAIM.

GEORGE M. BOURQUIN.

The existence of a placer location within a school section, or the pendency of an application for a placer patent therefor at the date when the grant of school lands becomes effective, will not operate to except such land from the grant to the State, if in fact said land is not mineral in character.

A homestead claimant for a tract of land within a school section will not be heard to say that such land is excepted from the grant to the State, by reason of its status under the mining laws at the date when the grant became operative; for, if in fact said land is not mineral it passed to the State, and if mineral it is excluded from appropriation under the homestead law.

Secretary Bliss to the Commissioner of the General Land Office, August 2, 1898.

(W. V. D.) (E. B., Jr.)

George M. Bourquin has appealed from the decision of your office, dated August 29, 1896, rejecting his homestead application, offered April 22, 1896, for the NE. ¼ of section 36, T. 21 N., R. 3 E., Helena, Montana, land district.

The application was rejected by the local office on May 11, 1896, on the ground that the land had passed to the State of Montana under its grant of school lands. On appeal by Bourquin your office affirmed the decision of the local office. The contention of Bourquin is that at the date of the admission of Montana into the Union the land was covered by a valid placer location for which application for patent had been filed, and that therefore, as mineral land, it was excepted from the school land grant to the State.

The land was surveyed in 1871, and returned as agricultural in character. The State of Montana was admitted into the Union on November 8, 1889 (26 Stat., 1551). Section 10 of the State's organic act, passed February 22, 1889 (25 Stat., 676), granted to the State, upon its admission into the Union, the sixteenth and thirty-sixth sections of public land in each township, for the support of the common schools, making provision therein for indemnity "where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress." Section 18 exempts all mineral lands from the grants made by the act, and specifically provides for indemnity for lands in sections sixteen and thirty-six found to be mineral in character.

The placer location of the land, referred to above, was made by one Paris Gibson, and others, on August 4, 1888, on account of the building stone said to be contained therein. Application thereunder for patent was filed October 21, 1889. A contest subsequently arising between the State and the placer claimants, judgment in favor of the State, under its said grant, was given by your office August 8, 1894, and no

appeal having been taken therefrom, the placer application was finally rejected, on June 12, 1895, and the case closed.

The right of the State attached to the land, if at all, at the date of the State's admission into the Union. It had not then been "sold or otherwise disposed of." The mere fact that the land was covered by a placer location or was embraced in a pending application for a placer patent did not constitute a disposition thereof or except it from the State's grant, if, in fact, it was not mineral land. Unless it were then of known mineral character, the right of the State became fixed and the title to the land passed under the grant. If, on the other hand, the land was then of known mineral character, and therefore excepted from the grant, it is for the same reason not subject to Bourquin's homestead application. Section 2318, Revised Statutes, provides that—

> In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

This reservation has been in force since December 1, 1873, at least, and since that time no title to public land known to be valuable for its minerals could be acquired in Montana, except under the provisions of the United States mining laws (Deffeback *v.* Hawke, 115 U. S., 392). It is not, therefore, necessary, for purposes of this case, to decide whether the land was or was not excepted, as mineral land, from the grant to the State, since in either event it is not subject to homestead application and entry. If not mineral land it passed to the State, and if mineral land it was excepted from the State's grant and is likewise excepted from homestead entry.

The rejection of the application is affirmed in accordance with the views herein expressed.

CHICALA WATER CO. *v.* LYTLE CREEK LIGHT AND POWER CO.

Motion for review of departmental decision of April 15, 1898, 26 L. D., 520, denied by Secretary Bliss, August 2, 1898.

HOMESTEAD—SECOND ENTRY—ACT OF MARCH 2, 1889.

McDONALD ET AL. *v.* HARTMAN ET AL.

A homestead applicant, whose application made prior to the act of March 2, 1889, is erroneously rejected, and who thereupon appeals, occupies under section 2, of said act, the same status as one who made entry prior to said act; and where said applicant subsequently under a departmental decision enters such portion of the land originally applied for as is then open to entry, reserving all rights under the first application, and thereafter relinquishes such entry, he may make a second entry of the remainder of said lands when it becomes subject to such appropriation.

Secretary Bliss to the Commissioner of the General Land Office, August 2, 1898.

(W. V. D.) (G. B. G.)

By departmental decision of February 18, 1889 (not reported), the Sioux half breed scrip location of Orille Stram upon lots 1 and 2, the

SW. ¼ of the NE. ¼ and the NW. ¼ of the SE. ¼ of Sec. 30, T. 63 N., R. 11 W., Duluth, Minnesota, was canceled and the land in question held "open to disposal under the public land laws of the United States applicable thereto."

On the next day, February 19, 1889, Houghton E. James presented his homestead application for these tracts, which application was rejected, and James appealed.

On February 23, 1889, soldier's additional homestead application was made in the name of Thomas Reed for all the lands embraced in James's said application, except the NW. ¼ of the SE. ¼, which the local officers received and issued final certificate thereon.

On November 20, 1889, while James's appeal was still pending, patent was inadvertently issued to Reed for the land included in his final certificate, and was delivered to the Germania Iron Company.

On December 21, 1894, the Department, considering the case on the appeal of James from the action of the local officers and your office in rejecting his application, declared his rights paramount to those of Reed, and, after holding in reference to the effect of said departmental decision of February 18, 1889, that

> a judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date without regard to the time when such judgment is noted of record in the local office,

said:

> The effect of said findings and conclusions is, to award . . . . to Houghton E. James the NW. ¼ of the SE. ¼ of said Sec. 30, T. 63 N., R. 11 W.
>
> The outstanding uncanceled patent, inadvertently issued to Thomas Reed, for lots 1 and 2, and the SW. ¼ of the NE. ¼ of said Sec. 30, deprives the Department of jurisdiction to extend the effect of this decision to these tracts.
>
> McDonald *et al. v.* Hartman *et al.*, 19 L. D., 547 *et seq.*

On August 16, 1895, James made homestead entry for said NW. ¼ of the SE. ¼, under his new application of that date. This application, covering only the NW. ¼ of the SE. ¼, was made in the usual form, except as follows, which was added thereto:

> Reserving all my rights to lots 1 and 2 and the SW. ¼ of the NE. ¼ of said section 30, originally applied for with the above described tract, as per my application of February 19, 1889, now on file in the General Land Office.

On September 23, 1895, this entry was canceled on James's relinquishment to the United States.

On February 15, 1897, the patent inadvertently issued to Reed was finally vacated and canceled by decree of the supreme court of the United States, in a suit instituted by the government for that purpose. Germania Iron Co. *v.* United States, 165 U. S., 379.

On March 12, 1897, the Germania Iron Company filed in your office an application asking the approval of the entry originally made in the name of Thomas Reed and the issue of a second patent thereon.

The granting of this application was resisted by James, who claimed

that upon the vacation of the Reed patent he became entitled to enter the land formerly included in said patent.

December 27, 1897, your office, considering the application filed as aforesaid, decided that James was not entitled to make entry of the tracts in question, and that a second patent should issue therefor to Reed.

Your office in that decision said:

> If James now takes the land covered by Reed's patent, he must do so either through an amendment to his entry No. 9899, under the rule laid down in Hadley *v.* Walter, 25 L. D. 276, or by making an additional or second entry therefor. His entry No. 9899, having been voluntarily relinquished and canceled, had no vital force at the time the lands were restored. It was no longer in existence and therefore cannot be now amended to include these lands. Not being able to take them by an amendment, he must then, if he takes them at all, do so under an additional or second entry, and I am at a loss to see how this can be done. It is a rule of very general application that but one entry can be made by the same person under the homestead laws. A single entry exhausts all the rights of the entryman. Certain exceptions to this rule have, however, been recognized by the Department, as, for instance, second entries have been permitted under certain circumstances where the first was defeated by an adverse claim, and under other circumstances where the lands entered proved to be unsuitable for agricultural purposes. But in no case like the one now under consideration has this right been granted.

The appeal of James brings the case here.

The case has been orally argued by counsel for James and the Germania Iron Company, and the facts and pertinent history of the case, hereinbefore recited, are not controverted. The questions presented by the appeal are, therefore, questions of laws.

These questions are distinctly put in issue by the appellant's specifications of error 3 and 4, which embrace, substantially, the whole of his contentions, as follows:

> 3. It was error to hold, even if the present application of James be necessarily considered an amendment of entry No. 9899, that such an amendment could not now be legally made to include the premises in controversy.
>
> 4. It was error to hold, even if the present application of James be necessarily considered an additional or second entry, that such an additional or second entry could not be allowed under the law, rules and authorities.

Clearly James may not be permitted to enter this land as an amendment to his original entry. That entry has been canceled by his voluntary act. There is no entry to amend. Can it be allowed as an additional or second entry?

Section 2 of the act of March 2, 1889 (25 Stat., 854), provides:

> That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law may make a homestead entry of not exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated.

In the case of Hertzke *v.* Henermond (25 L. D., 82), it was held that said section

> provides for the allowance of a second homestead entry in any case in which the applicant, prior to the enactment of the statute, made entry under the homestead law, but has not perfected title thereunder either before or since that time. (Syllabus.)

The case of James is within the spirit of this ruling. He has not perfected title to any tract of land under the pre-emption or homestead laws of the United States. Prior to the enactment of the statute, he made application to enter the land in controversy as a homestead. The land was public land and subject to his application when made.

Departmental decision of February 18, 1889, canceling the scrip location of Orille Stram took effect on that day, and the land thereby released from appropriation became subject to entry as of that date. That this is so is not only *res judicata* in this case, but it is the uniform ruling of the Department.

For some of the later decisions on this question, see McDonald *v.* Hartman (19 L. D., 547); Oettel *v.* Dufur (22 L. D., 77); John W. Korba (24 L. D., 408).

James's application, therefore, of February 19, 1889, was an appropriation of the land, and his rights attached as of that date.

As applied to the facts of this case, there is no difference in principle between a homestead application made of record and one offered and erroneously rejected, the application to enter being equivalent to an actual entry, so far as the rights of the applicant are concerned. Thomas Hammill (2 L. D., 36); McMichael *v.* Murphy *et al.*, (20 L. D., 535).

It was argued that by his entry of August 6, 1895, for the NW. ¼ of the SE. ¼ aforesaid, James abandoned his original application. This contention is not well taken because in his second application, which did not embrace any land not included in the first application, and therefore was not inconsistent therewith, James expressly reserved all rights under his original application to the land covered thereby but not included in his second application which was made as a re assertion or in furtherance of the original application rather than as a new and independent one. His legal status is therefore the same as though his original application had been allowed and placed of record and for the purposes of this case it is the same as if he had, prior to the enactment of the statute of March 2, 1889, made entry under the homestead law. He has therefore the right to make a second entry under section 2 of said act.

If it be said that he should not be permitted to make a second entry of the land here involved, because of the claimed rights of the Germania Iron Company, initiated February 23, 1889, by its application to locate the soldier's additional right of Thomas Reed, the answer is that

the original application of James antedates this claim, and, as already shown, he has never abandoned his claim.

But for the inadvertent issue of the patent to Reed, all of the land embraced in the original application would have been awarded to James. The land now in controversy came as fully within the reasoning of said departmental decision of December 21, 1894, as did the land actually awarded to him thereby; but the outstanding uncanceled patent prevented the Department from carrying that decision into effect as to the lands in controversy.

Upon the rendition of that decision James took the only course open to him to fully protect his rights. If he had failed or refused within a reasonable time to enter so much of the land awarded to him by said decision as was subject to entry, he would have forfeited all rights secured by the decision as to such land.

It does not appear whether or not he was allowed any specified period of time within which to make entry after notice of the decision awarding him the land, but the rule is that the successful party must, to protect his rights under such a decision, file his application within the time specified in the notice of the decision, or, in the absence of a specified time, within a reasonable time, and if not asserted, it may be lost. See Charles A. Parrott, 26 L. D., 268.

The equities of the case largely preponderate in favor of James, and the law allows a second entry of the land applied for.

The decision appealed from is reversed, and the case remanded for proceedings consistent with this decision.

BENECKE *v.* POWELL.

Motion for review of departmental decision of June 7, 1898, 27 L. D., 47, denied by Secretary Bliss, August 2, 1898.

HOMESTEAD—WIDOW—PROOF OF MARRIAGE.

WILSON *v.* WILSON.

On the application of one claiming as the widow of a deceased homesteader to make cash entry, the fact of marriage may be established by evidence of co-habitation and repute, it appearing that the statute invoked as against such marriage contains no words of nullity.

Secretary Bliss to the Commissioner of the General Land Office, August 2, 1898.
(W. V. D.) (C. W. P.)

September 19, 1893, Thomas F. Wilson made homestead entry, No. 123, of the NE. ¼ of Sec. 24, T. 29 N., R. 4 W., I. M., Enid land district, Oklahoma Territory.

July 19, 1895, Clementine C. Wilson, as the widow of said Thomas

F. Wilson, who died September 12, 1894, applied at the local office, at Enid, to make cash entry of said land. Whereupon notice was issued, and September 9, 1895, fixed as the time for the submission of final proof, when Samuel E. Wilson, the father of the said Thomas F. Wilson, filed an affidavit against the allowance of her final proof, alleging that she was not the widow of said Thomas F. Wilson, deceased.

Testimony was taken before the local officers, who, on February 1, 1896, approved the final proof of the widow, and dismissed Samuel E. Wilson's protest. An appeal was taken to your office, and on October 7, 1896, you affirmed the action of the local officers. A further appeal brings the case before the Department.

The only question to be determined is: Was Clementine C. Wilson the lawful wife of the said Thomas F. Wilson?

Section 9 of the act of Congress of March 3, 1887 (24 Stat., 635), directs that marriages in the Territories of the United States shall be solemnized and certified in a certain manner, and section 10 provides:

> That nothing in this act shall be held to prevent the proof of marriages, whether lawful or unlawful, by any evidence now legally admissible for that purpose.

Mrs. Wilson testified that she was married to Thomas F. Wilson on October 5, 1887, in the Cherokee Outlet in Indian Territory, where they had gone for the purpose of being married. The marriage was not publicly acknowledged until about one year later. After that time the proof shows that they lived together professedly in the relation of husband and wife.

The evidence does not show that the requirements of the act of March 3, 1887 (*supra*), were complied with. But it is held in Meister *v.* Moore, 96 U. S., 76, that a marriage valid at common law is valid, notwithstanding the statutes of the State where it is contracted prescribe the manner in which it shall be solemnized, unless they contain express words of nullity. And it is generally held by the courts of this country, that where no celebration is necessary to the validity of the marriage, the marriage may be proved in civil cases by cohabitation and repute. 2 Greenleaf's Ev., Sec. 462; see also Strain *v.* Hostotlas, 16 L. D., 137, and Roudebush *v.* Waitman, 21 L. D., 360. The statute here invoked against the marriage contains no words of nullity, so if it be applicable to Indian Territory it does not invalidate this marriage or prevent other proof thereof than that named in the statute.

Your office decision is therefore affirmed.

GERMAIN *v.* LUKE.

Motion for review of departmental decision of April 30, 1898, 26 L. D., 596, denied by Secretary Bliss, August 2, 1898.

REPAYMENT—DOUBLE MINIMUM EXCESS.

JOHN P. SHANNON.

There is no authority for the repayment of double minimum excess erroneously charged for lands within the limits of a railroad grant.

Secretary Bliss to the Commissioner of the General Land Office, August 2, 1898.

(W. V. D.) (J. L. McC.)

John P. Shannon has appealed from the decision of your office, dated December 4, 1896, rejecting his application for repayment of the amount paid in excess of single minimum, upon his pre-emption cash entry for the S½ of the NW¼ and the S½ of the NE¼ of Sec. 19, T. 5 S., R. 12 E., The Dalles land district, Oregon, made July 3, 1878.

This land is in an odd-numbered section within the primary limits of the grant of July 2, 1864 (13 Stat. 365), to the Northern Pacific Railroad Company, and would have been embraced in the withdrawal in aid of such grant made on filing the map of general route, August 13, 1870, but for the fact that it was then covered by the pre-emption declaratory statement of one William Figgan, dated June 8, alleging settlement May 8, 1869.

Shannon at the time he made entry of the land, was required to pay therefor at the rate of $2.50 per acre. His application for repayment is based upon the assertion that the lawful price for the land at the time of his entry was only $1.25 per acre.

The proviso to Sec. 2357 R. S., relating to the price of specified lands within the limits of a railroad grant is as follows:

> That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of congress, shall be two dollars and fifty cents per acre.

The only portion of the act making the grant to the Northern Pacific Railroad Company which affects the price of public lands within the limits of such grant is the latter part of section 6, which reads as follows (13 Stat., 369):

> And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale.

It is urged that these two statutes apply only to "alternate reserved lands," otherwise called "reserved alternate sections," and that they have no application to the odd-numbered sections, the alternate reserved sections being even-numbered.

The only statute conferring authority upon the Secretary of the Interior to make repayment of excess where lands have been sold at double minimum price is that portion of section 2 of the act of June 16, 1880 (21 Stat., 287), which provides:

> In all cases where parties have paid double minimum price for land which has afterward been found not to be within the limits of a railroad grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to the heirs or assigns.

That the land embraced in Shannon's cash entry was clearly within the limits of the grant to the Northern Pacific at the time of such entry is not questioned. If it be conceded, therefore, that the lawful price for this land was $1.25 per acre, instead of the double-minimum price of $2.50 per acre, there is yet no authority for repayment by the Secretary.

The decision of your office in rejecting Shannon's application is correct, and is hereby affirmed.

RAILROAD GRANT—SETTLEMENT CLAIM—PRE-EMPTION CLAIM.

CENTRAL PACIFIC R. R. CO. *v.* HUNSAKER.

Temporary residence for the sole purpose of cultivating the land, and not for the establishment and maintenance of a permanent home, does not create a valid settlement claim under the pre-emption law.

The cultivation of a tract of land, at the time when the line of the Central Pacific road is definitely fixed, does not constitute a pre-emption claim that has, at such time, attached within the meaning of the excepting clause in the grant to said company.

Secretary Bliss to the Commissioner of the General Land Office, August 2, 1898.
(W. V. D.)

The Central Pacific Railroad Company has appealed from your office decision of May 25, 1895, holding that the NW. ¼ of Sec. 5, T. 10 N., R. 2 W., Salt Lake City, Utah, was excepted from the operation of the grant made by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 368), and directing the cancellation of the company's list covering said tract.

This land is within the limits of the grant to the Central Pacific Railroad Company the line of whose road was definitely fixed by the filing of the map of definite location October 20, 1868, but no executive order of withdrawal was issued thereon until May 15, 1869. The operation of the public land laws was extended to the Territory of Utah July 16, 1868 (15 Stat., 91), but no land office was opened in the Territory until March 9, 1869.

May 29, 1869, Jarvis Johnson filed preemption declaratory statement for the land alleging settlement thereon April 14, 1869.

November 4, 1884, the land was listed by the company on account of its grant but patent has not been issued.

The present case arose upon the application of Joseph Hunsaker to make homestead entry of the land, alleging that the tract was excepted from the grant by reason of a preemption claim existing at the date of the filing of the map of definite location.

Hearing was duly ordered, and the case was submitted upon the following agreed statement of facts:

That the NW. ¼ of Sec. 5, T. 10 N., R. 2 W., was first settled upon in the year 1865 by Abraham Hunsaker, and that Jarvis Johnson settled upon the said land in the year 1866; that during the harvest season of the years 1866, 1867 and 1868, the said

Jarvis Johnson went onto the land in a wagon, and resided on the land in that wagon and was living on the land in that wagon October 20, 1868. After each harvesting season the wagon was driven away and was brought back the next season, and occupied by Jarvis Johnson in the same manner.

That the said Jarvis Johnson and Abraham Hunsaker were qualified preemptors and homesteaders; that the said Abraham Hunsaker was a soldier in the army and had never used any of his preemption rights or homestead rights; that the said land was fenced and the sage brush cleared from about sixty acres, and about sixty acres of it was broken, cleared, and cultivated on the 20th day of October, 1868; that the said Johnson made a filing on the same on the 29th day of May, 1869; that the value of the improvements on the said tract of land on the 20th day of October, 1868, was about $500.00; that Johnson in the season cultivated and in the season garnered the grain and crops on the said land for a period of six years, and then sold his interest and claim to said land to Abraham Hunsaker, who plowed, cultivated and improved the same until 1878, when he transferred his interest in the said land to Joseph Hunsaker, who used the same as his farm until 1891, when D. P. Tarpey, during the absence of the said Hunsaker, and without the consent of the said Hunsaker, and without any process of any court, took possession of the said tract of land; that the said Joseph Hunsaker has been kept out of the possession of the said tract of land by the duress and threats and the exhibition of force on the part of said company and its agents; that said Joseph Hunsaker is a citizen of the United States and a qualified preemptor and homesteader; that there has never been levied or assessed upon said land any taxes against the said C. P. R. R. Co.; that the value of the improvements at the time that the said Joseph Hunsaker was dispossessed of the said land was $1,000.

The local office, March 12, 1894, and your office, May 28, 1895, and upon review October 8, 1895, held that at the time the line of said road was definitely fixed a preemption claim had attached to this land which excepted it from the company's grant.

The land being non-mineral in quality, its status at the time when the line of road was definitely fixed determines whether it passed to the railroad company under its grant or was excepted therefrom. Van Wyck *v.* Knevals (106 U. S., 360.)

Whether Abraham Hunsaker, who settled upon the land in the year 1865, maintained his settlement up to the time when the public land laws were extended over Utah or up to the definite location of the road, and whether he ever intended to claim or obtain title to the land under the public land laws are not shown. So far as shown his relation to the land did not affect the attaching of the company's grant and need not be further considered.

It is shown that at the time of the definite location of the road the land was fenced, sixty acres thereof were cleared and under cultivation and there were improvements thereon of the value of about $500, but it is not shown that these improvements embraced any house or building of any kind intended to make the land habitable.

While the agreed statement states that Johnson "settled" upon the land in the year 1866 and was "living" there October 20, 1868, when the line of the road was definitely located, it also states that during the "harvest season of the years 1866, 1867 and 1868 the said Jarvis Johnson went onto the land in a wagon and resided on the land in that

wagon" and "after each harvest season the wagon was driven away and was brought back the next season and occupied by Jarvis Johnson in the same manner," and that "Johnson in the season cultivated and in the season garnered the grain and crops on the said land for a period of six years." Taken as a whole, the statement clearly shows that Johnson's presence upon the land was for the purpose of cultivation. He remained there only during the cultivating and harvesting season, and sheltered himself with a wagon taken there for that purpose at the beginning of each season and driven away at the end thereof. This shows that his settlement and residence were temporary and for the single purpose of cultivation. Considering the time covered thereby, they did not have the elements of permanency and stability incident to the establishment and maintenance of a home. The only evidence of an intention upon the part of Johnson to acquire title to the land under the public land laws is his preemption declaratory statement filed May 29, 1869, but in that his settlement is alleged to have been made April 14, 1869, which was after the rights of the railroad company had attached by the definite location of the road. This disposes of the claimed exception on account of Jarvis Johnson's relation to the land.

For the reason therefore that it is not shown that at the time of the definite location of the road, Abraham Hunsaker or Jarvis Johnson was a settler upon the land intending to acquire title thereto under the public land laws it must be held that the land in controversy was not excepted from the company's grant. This is apart from the ruling announced in Kansas Pacific Railroad Co. *v.* Dunmeyer (113 U. S., 629, 644), approved in Hastings and Dakota Railroad Co. *v.* Whitney (132 U. S., 357), Whitney *v.* Taylor (158 U. S., 85), and Northern Pacific Railroad Co. *v.* Colburn (164 U. S., 383), that "mere settlement, residence or cultivation of the land" does not come within the meaning of the excepting clause in the grant which "meant a proceeding in the proper land office, by which the inchoate right to the land was initiated." Under these decisions it would equally follow that a preemption claim had not attached to the land at the time when the line of road was definitely fixed and the case might have been disposed of by a reference to the recent case of Wight *v.* Central Pacific Railroad Co. (27 L. D., 182), which considered these decisions at length, but counsel having discussed the case upon other grounds the matters embraced in that discussion have also been considered.

The decision of your office is hereby reversed.

OKLAHOMA LANDS—SECOND HOMESTEAD.

HARRIS *v.* WALKER.

The right to make entry of lands obtained from the Muscogee or Creek Indians, as provided in the first proviso to section 13, act of March 2, 1889, does not extend to one who has failed to secure title to a particular tract under the homestead law, if such person has secured title to other land under said law; but the right to make entry under said section does include one who has made an entry under the commutation provisions of the homestead law.

Secretary Bliss to the Commissioner of the General Land Office, August 2, 1898.

(W. V. D.) (G. B. G.)

In July, 1888, Masten Harris made homestead entry, in the State of Kansas, for the SW. ¼ of the NE. ¼ of Sec. 7, T. 9, R. 21 W., Sixth P. M., which entry he commuted to cash in February, 1890.

On December 2, 1891, he made homestead entry for the S. ½ of the NE. ¼ and the N. ½ of the SE. ¼ of Sec. 8, T. 9 S., R. 23 W., Kirwin, Kansas, which entry was canceled, July 8, 1893, on a contest for abandonment and failure to reside upon and cultivate the land.

On January 27, 1894, he made homestead entry for the S. ½ of the NE. ¼ of Sec. 7, T. 18 N., R. 8 W., Kingfisher, Oklahoma, and in April following he applied for a restoration of his homestead right.

On May 9, 1894, his application for restoration, etc., was denied. From this action he did not appeal, and on March 20, 1895, his said entry of January 27, 1894, was canceled.

On August 5, 1895, he made homestead application for the land now in controversy—to-wit: the N. ½ of the SW. ¼ and the N. ½ of the SE. ¼ of Sec. 35, T. 15 N., R. 10 W., Kingfisher, Oklahoma.

On December 14, 1895, John Walker applied to enter the SW. ¼ of said section 35. Walker's application was rejected by the local officers: 1st, because the tract applied for was covered by a townsite application, and, 2d, because of the prior application of Harris. Walker appealed.

Your office, by decision of March 17, 1896, rejected Harris's application, on the ground that he had theretofore exhausted his homestead right, and it appearing that the townsite application had been abandoned, closed the case as to that application, and directed the allowance of Walker's application.

The appeal of Harris brings the case here.

The land in controversy is situated in that part of the Indian country ceded to the United States by the Muscogee or Creek Indians, January 19, 1889.

The act of March 2, 1889 (25 Stat., 980–1005), says that the provisions of that act with reference to lands to be acquired from the Seminole Indians "shall apply to and regulate the disposal of the lands acquired from the Muscogee or Creek Indians," and, as to the Seminole lands, enacts that "any person who having attempted to but for any cause

failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands."

In the case of James W. Lowry (26 L. D., 448), it was held (syllabus):

In determining the qualifications of an applicant for the right to enter lands in Oklahoma obtained from the Seminoles and Creek or Muscogee Indians, as provided for in the first proviso to section 13, act of March 2, 1889, the status of the applicant at the date of his application must control; and if he has at such time, attempted to, but for any cause failed to secure title in fee to a homestead under existing law, or shall have made entry under the commutation provision of the homestead law, he is qualified to make entry under the provisions of said section.

Harris is not a person "who failed to secure a title in fee to a homestead under existing law." True, he failed to secure title to the land entered by him December 2, 1891, but inasmuch as he had already secured a title in fee to the land entered by him in July, 1888, he is not within this provision of the statute.

The statute does not include a person who has failed to secure title to some particular tract of land, if such person has secured title to other land under the homestead law.

Harris is not therefore within this provision of the statute.

He is, however, a person who "made entry under what is known as the commuted provisions of the homestead law," and therefore within the rule in the Lowry case, above cited. The cancellation of his entry of January 27, 1894, and the denial by your office of his application for a reinstatement of his homestead right are without prejudice to his right to enter the land embraced in his present application.

The decision appealed from is reversed, and the cause remanded, with directions to allow the application of Harris, unless further objection appears.

CIRCULAR.

AMENDMENT TO RULES AND REGULATIONS GOVERNING FOREST RESERVES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
Washington, D. C., August 3, 1898.

Paragraph 21 of the rules and regulations governing forest reserves, issued June 30, 1897 (24 L. D., 589), is hereby amended to read as follows:

FREE USE OF TIMBER AND STONE.

21. The law provides, that

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fence-

ing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

This provision is limited to persons resident in forest reservations or within a reasonable distance thereof in the State or Territory where the forest reservation is located who have not a sufficient supply of timber or stone on their own claims or lands for the purposes enumerated, or for necessary use in developing the mineral or other natural resources of the lands owned or occupied by them. Such persons, therefore, are permitted to take timber and stone from public lands in the forest reservations under the terms of the law above quoted, strictly for their individual use on their own claims or lands owned or occupied by them within the State or Territory where such reservation is located, but not for sale or disposal, or use on other lands, or by other persons: *Provided*, that where the stumpage value exceeds one hundred dollars, applications must be made to and permission given by the Department.

BINGER HERMANN,
Commissioner.

Approved, August 3, 1898:
C. N. BLISS,
Secretary.

ACCOUNTS—SELECTIONS IN THE TERRITORY OF NEW MEXICO.

CIRCULAR.

Commissioner Hermann to the Governor, the Surveyor-General, and the Solicitor-General, of New Mexico, August 1, 1898.

Section 8 of the act of June 21, 1898, entitled "an act to make certain grants of land to the Territory of New Mexico and for other purposes," constitutes the governor of the Territory of New Mexico, the surveyor-general of the Territory of New Mexico, and the solicitor-general of said Territory a commission under the direction of the Secretary of the Interior to select the land granted in said act.

Section 11 of said act appropriates the sum of ten thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of the Interior, for the purpose of paying the expenses of the selection and segregation of the lands granted by said act, including such compensation to said commission as the Secretary of the Interior may deem proper.

In conformity with the provisions of said act, and by virtue of the authority therein granted, the following regulations are hereby promulgated:

The compensation of each of said commissioners is fixed at the rate of $200 per annum.

A locating agent for the commission will be appointed by the Secretary of the Interior, who will be allowed the sum of six dollars per day and actual expenses of transportation.

A clerk for the commission will also be appointed by the Secretary of the Interior, with compensation at the rate of $1,000 per annum.

An allowance for office rent, fuel and lights for commission, not to exceed $200 per annum, is also authorized.

The surveyor-general of New Mexico will be appointed a special disbursing agent, and as such will receive advances from the appropriation of $10,000 provided in section 11 of the act above referred to, and will pay all expenses of the commission, except the compensation and expenses of the locating agent, who will render his accounts for compensation and expenses to this office. The expense account of the locating agent must be supported by proper vouchers, and the account and vouchers must conform to the requirements of circular of "instructions governing traveling expenses and other allowances, and preparation of weekly reports and accounts," dated March 6, 1894.

The weekly reports provided for will be rendered to this office by the locating agent on General Land Office blank form 4–489, with which he will be furnished.

Expenditures not authorized by said circular or specially authorized by this office will be disallowed.

The locating agent cannot employ or appoint assistants or sub-agents to make non-mineral affidavits or for other purposes *with compensation or expenses to be paid by the United States.*

The registers' and receivers' fees of one dollar for each final location of one hundred and sixty acres, as fixed by section 2238, Revised Statutes, and by paragraph 14 of circular of July 20, 1898 (27 L. D., 281), required to accompany each list, must be paid by the Territory of New Mexico. All the expenses incurred by the commission in proceedings to determine the mineral or non-mineral character of lands, as provided in "United States mining laws and regulations thereunder," approved December 15, 1887, sections 104 to 108, inclusive, under the head of "Railroad and State selections," must also be paid by the Territory.

The surveyor-general and special disbursing agent will make requisition for funds to pay compensation of commissioners and clerk, office rent, stationery blanks and any other authorized expenditures, and will render a quarterly disbursing account therefor under the appropriation above referred to.

Approved,

C. N. Bliss, *Secretary.*

PAYMENT—PUBLICATION OF FINAL PROOF NOTICE.

GRAPHIC PUBLISHING COMPANY.

Money deposited with the receiver, in accordance with official instructions, to pay for the publication of final proof notice, is a payment to such receiver as a public officer of the United States; and if the register, acting under said instructions, thereafter causes said publication to be made, his action constitutes an undertaking on the part of the government to pay for such service to the extent of the deposit made therefor.

Secretary Bliss to the Commissioner of the General Land Office, August 5, 1898.
(W. V. D.) (E. F. B.)

With the letter of your office of August 30, 1893, there was transmitted the appeal of the Graphic Publishing Company from the decision of your office of July 19, 1893, disallowing the claim of said company for publishing the final proof notices of Jose A. Gomez and Seth W. Hathaway, Del Norte, Colorado, land district.

It appears from the papers submitted with your said letter that said company presented their bill for publishing said notices, claiming that the money was deposited by the claimants with the receiver in accordance with the circular of instructions of August 13, 1889, and that said notices were sent to the office of said publishing company by the register in pursuance of said instructions, with the statement that the publication fee had been paid to the receiver.

Your office, by letter of July 19, 1893, disallowed said claim, upon the ground that it was the duty of the publisher to obtain his fee before he furnished the proof of publication.

Upon motion for review your office, by decision of August 8, 1893, adhered to said ruling, in which it was said:

> That the United States government made no contract with the Graphic Publishing Co. If the receiver at Del Norte, Colo., received the money to pay for the publication of the notices in question he received the same as an agent or trustee of the party or parties making final proof. Receivers of public moneys are not permitted to make any contracts which will bind the United States government without special authorization from this office. This office has no funds at its command from which it can pay any claims not legally authorized.

The instructions (*supra*) relative to the payment of costs for advertising final proof notices are as follows:

> 1. Registers of local land offices are not authorized to receive and retain money deposited to pay for publishing final proof notices, but all funds of this character are to be paid to the receiver.
>
> 2. The receiver will notify the register that the necessary deposit has been made, and the register will cause notice of intention to make final proof to be published.
>
> 3. Settlers are not to be deprived of the right to make their own contracts for publishing notice of intention to make final proof, and to make payment therefor directly to the publishers of the paper, after the notice has been prepared by the register and the paper designated by him, on presenting to the register a statement from the publisher or his agent that the money for the payment of said notice has been paid to, or deposited with said publisher.

4. Rule 5 of the "General Circular" of this office is modified to conform to these instructions."

If the claimants deposited the money with the receiver to pay for the publication of the final proof notices in accordance with the first paragraph of said instructions, it was a payment to the receiver as a public officer of the United States, and not a payment to him as agent of the claimants. Smith *v.* United States, 170 U. S., 372. If after such payment had been made to the receiver, the register acting under the authority of the second paragraph of said instructions caused said publication to be made, it was an undertaking by the government, through its duly authorized agent, to pay for such service to the extent of the deposit made therefor.

While there may be no fund or appropriation from which this bill can be paid (it appearing that the receiver has absconded and is a defaulter), there is no reason why the Department should not recognize its just obligation to pay the same, in order that the attention of Congress may be called to the necessity of making an appropriation for such purpose.

The decision of your office is reversed and the case is remanded with directions to pass upon the application in accordance with the views herein expressed.

INDIAN LANDS—RELINQUISHMENT—APPLICATION—APPROXIMATION.

DICKIE *v.* KENNEDY.

A relinquishment of a Crow Indian allotment under the agreement of December 8, 1890, is not effective until approved by the Interior Department; but an entry of the land so relinquished prior to such approval, while irregular, is not invalid, and will not be canceled where the relinquishment is subsequently approved.

The fact that an entry is allowed on papers executed prior to the time when the land is open to such disposal, is a matter as between the entryman and the government, where it appears, on issue joined, that the entryman, as the prior settler, is entitled to make entry of the tract involved.

The rule of approximation will not be enforced where it operates to deprive the entryman of his improvements, and the difference between the excess and the deficiency is but slight.

Secretary Bliss to the Commissioner of the General Land Office, August (W. V. D.) *5, 1898.* (P. J. C.)

The land involved in this controversy is lot 5, sec. 34, and N. ½ of the NW. ¼ sec. 35, T. 1 N., R. 26 E., Bozeman, Montana, land district, and is within what was formerly a part of the Crow Indian reservation, a part of which was opened to settlement by the President's proclamation of October 15, 1892 (27 Stat., 1036). In said proclamation appears this language:

Whereas, it is stipulated and agreed by the second clause or section of said agreement of August twenty-seventh, eighteen hundred and ninety-two, that all lands

" Subsequently carried into General Circulars of 1892, p. 61, and 1895, p. 77.

ceded by said agreement may be opened to settlement upon the approval of said agreement, by proclamation of the President: *Provided*, That all lands within the ceded tract selected or set apart for the use of individual Indians, and described in the aforesaid schedules "A" and "B" shall be exempt from cession and shall remain a part of the Crow Indian reservation, and shall continue under the exclusive control of the Interior Department until they shall have been surveyed and certificates or patents issued therefor, as provided in the agreement of December eighth, 1890, or until relinquished or surrendered by the Indian or Indians claiming the same: *Provided further*, That such lands shall be described as set forth in schedules A. and B., and shall be exempted from settlement in the proclamation of the President opening the ceded lands, and that where lands so set apart are not described by legal subdivisions then the township or section, or tract of land, within whose limits such Indians' selections are located shall not be opened to settlement until the Indian allotments therein contained shall have been surveyed and proper evidence of title issued therefor.

By the 11th clause of the agreement with the Indians of December 8, 1890 (26 Stat., 1041) it is provided:

That all lands upon that portion of the reservation to be herein ceded which, prior to the date of this agreement, have been allotted in severalty to Indians of the Crow tribe shall be retained and enjoyed by them: *Provided, however*, That such Indians shall have the right at any time within three years to surrender his or her allotment, and select a new allotment within the retained reservation upon the same terms and conditions as were prescribed in selecting the first allotment.

It is further provided, That every Indian who shall surrender an allotment within the time specified, that has improvements upon it, shall have like improvements made for him upon the new allotment, and for this purpose the sum of five thousand dollars, or so much of it as may be necessary, is hereby appropriated and set apart.

The land was surveyed, and the plat received at the local office August 7, 1895. Notice was given that the land would be subject to entry after September 8, 1895.

Of the land in controversy lot 5, sec. 34, and the NE. ¼ of the NW. ¼ of sec. 35 were allotted to an Indian called High Nose, and were included in the schedule of the President's proclamation.

It appears that on July 1, 1895, Edward B. Kennedy presented his application to make a homestead entry of lot 5, sec. 34 (which contains 21.28 acres) W. ½ NW. ¼ of sec. 35; lot 7 (containing 34.90 acres) and SE. ¼ SW. ¼ of sec. 26, making a total of 176.18 acres. All the papers in connection with this entry are dated July 1, 1895, and all the affidavits are of the same date.

With the application to enter was presented the relinquishment of the Indian High Nose for all the land included in the application that had been allotted to him. His relinquishment is dated June 26, 1895, and is approved by "W. H. Steele, farmer in charge of sub-agency" and by the army officer "act'g U. S. Indian Agent." Said relinquishment was forwarded through the regular channels and approved by the Secretary of the Interior October 12, 1895.

The application is endorsed "July 1, 1895, payment offered and relinquishment filed," also "not accepted for the reason that there is no plat in this office for the land sought to be entered."

The same papers were again tendered and accepted on September 9, 1895. The certificate of the register to the application (form 4-007) is dated as of that date, but otherwise everything is dated July 1, 1895.

September 10, 1895, William Dickie presented his application to make homestead entry of lot 5, sec. 34; W. ½ of the NW. ¼ and SW. ¼ of the NW. ¼ of sec. 35, and also filed an affidavit of contest against Kennedy's entry, alleging prior settlement.

A hearing was had before the local officers, and as a result they recommended that the contest be dismissed. In deciding the case they were of the opinion that it was not necessary to review the testimony as to prior settlement:

> that any settlement by either party previous to sale and relinquishment by said Indians was a trespass . . . . But should it be thought that settlement previous to relinquishment was necessary to show prior right as between the litigants, our opinion would be in favor of Kennedy.

On appeal your office affirmed the action below but principally upon the ground that Kennedy was the prior settler on the tract. Whereupon the contestant prosecutes this appeal.

From an examination of the testimony it is found that in your office decision the facts as disclosed are fairly and sufficiently set forth and the Department concurs in the opinion that Kennedy settled on the land prior to any settlement made by Dickie.

Counsel for Dickie, in their brief, contend the land was not subject to settlement or entry until the Indian relinquishment had been approved by the Interior Department when it became subject to the settlement or entry of the first legal applicant; that the entry of Kennedy is invalid for the reasons, first, because made before the relinquishment was operative; second, because it was made upon papers executed prior to the time the land was subject to entry; and third, because the land included in his entry is in excess of one hundred and sixty acres.

These questions are now for the first time presented for consideration, by the brief filed by local counsel. They are not even suggested in the specifications of error, the errors there assigned being those of fact only.

The NW. ¼ of the NW. ¼ of sec. 35, upon which both parties hereto made their settlement, was not included in schedules A and B—the rest of it was. Under the terms of the proclamation therefore the tract described was made subject to entry by the proclamation, while the balance was exempted from settlement, and were not "opened to settlement until the Indian allotments therein contained shall have been surveyed and proper evidence of title issued therefor." The exact date of the allotment to the Indians does not appear, but it is not considered that this is material to the issue here presented, for the reason it is conceded that they were made prior to their first acts of settlement.

At the time Kennedy made his entry the Indian relinquishment had been executed and approved by the Indian agent. While it is true

that the relinquishment did not become absolute in its character until approved by the Interior Department, yet it evidenced the intention of the Indian to relinquish his allotment and it is presumed that for this reason it was allowed. Under the circumstances, while the entry is perhaps irregular, it is not considered illegal.

It is not considered that Kennedy's entry was void because made on papers executed prior to the date when the land was subject to entry. In the case of Smith *v.* Malone (18 L. D., 482), and the subsequent cases following that doctrine, the several applications were rejected by the local office and did not become a matter of record. This entry was not attacked by the contestant on that ground, and the defendant has had no notice of any such objection till the case came before the Department. His entry was allowed by the local officers, and it has been determined in the issues joined that he is the prior settler on the tract. It is therefore purely a matter between him and the government, and under the circumstances there is no reason why he may not amend his papers and file them as of the date of his entry.

Kennedy's entry is not void for excess. The rule is that

> where the difference between the excess and the deficiency that would be produced by approximation is but slight, the entry may be allowed to stand as made. (Vernon B. Matthews, 8 L. D., 79); also the rule of approximation will not be enforced where it operates to deprive the entryman of his improvements, and the difference between the excess and the deficiency is but slight. (Davis *v.* No. Pac. 27 L. D.,78.)

Applying these rules to the case at bar it is found that Kennedy has improvements on lot 5, the smallest legal subdivision, consisting of some breaking and his residence, which is on the line between that lot and the subdivision east. He would therefore not be required to relinquish either of these. The next smallest tract, lot 7, has 34.90 acres. This would cut the entry down to 141.28: 18.72 acres less than a quarter-section. The excess as the entry now stands is but 16.18 acres, 2.54 acres less than the deficiency would be by deducting lot 7.

Your office judgment is affirmed.

HOMESTEAD CONTEST—ABANDONMENT.

LUELLIN *v.* ADAIR.

A charge of abandonment against a homestead entry is not established, where the absence shown is subsequent to a period of five years continuous residence on the tract involved.

Secretary Bliss to the Commissioner of the General Land Office, August 5, 1898.

(W. V. D.) (J. L. McC.)

James E. Adair, on June 2, 1891, made homestead entry for lot 3 of the NE. ¼ of sec. 19, T. 31 N., R. 9 W., and the E. ½ of the NE. ¼ of sec. 24, T. 31 N., R. 10 W., Ironton land district, Missouri.

On January 19, 1896, Nathan Luellin initiated contest against said entry, charging abandonment.

Pursuant to notice the parties appeared before John T. Lynch, notary public at Houston, Missouri, on March 10, 1896, at which time and place the plaintiff introduced his witnesses, who were cross-examined by defendant's attorney.

The defendant, and the local officers, allege that the notary public above named refused the defendant the right to offer testimony in his own behalf. This allegation is denied by counsel for the plaintiff. Under the circumstances of this case it does not matter whether this statement is true or not.

The testimony taken at the hearing showed that the entryman, Adair, has not resided on the land since 1893; but that it has been occupied and cultivated by his tenants.

It was further shown that Adair had resided upon, improved and cultivated the land from 1887 to 1893.

The local officers found:

> From the testimony presented it appears that the entryman, James E. Adair, resided upon and improved the land embraced in his said homestead entry No. 11,163 for five years or more—residence being prior and subsequent to date of entry.

Hence they held that his entry ought not to be disturbed.

The contestant appealed to your office; which, on November 24, 1896, affirmed the decision of the local office.

The contestant has appealed to the Department, the gist of his several allegations being contained in the first, to wit: "Residence before filing does not run on a homestead entry."

Counsel for contestant has apparently overlooked the act of May 14, 1880 (21 Stat. 140), the third section of which provides that the right of a homestead entryman "shall relate back to the date of settlement." This means (*inter alia*) that the law is satisfied when an entryman has shown five years' compliance with law after the date of his settlement. In the case of Falconer *v.* Hunt *et al.* (6 L. D., 512), one Alexander W. Cameron made homestead entry December 8, 1882, and final proof May 28, 1883. The contestant in that case contended that such final proof was insufficient because it did not show compliance with law for five years *after entry;* but the Department said (page 517):

> Cameron's actual residence on the land covered a period exceeding five years next preceding the date of final proof. His improvements were valuable and extensive, his good faith at that time was manifest, and there was then no adverse claim. The bare technical objection to his final proof should not be allowed to defeat the manifest object and purpose of the law. His proof was sufficient and is hereby affirmed.

Many cases of a similar character might be cited.

It is true that, in the case above cited, Cameron had made final proof, and such final proof showed compliance with the homestead law for the five years immediately preceding final proof, while in the case at bar final proof had not been made. Nevertheless the period within which

final proof might be made had not expired. In this respect the case comes within the departmental ruling in the case of Thomason *v.* Patterson (18 L. D., 241, 244):

> Residence upon a homestead is not required after the expiration of five years as a pre-requsite to patent; nor does a change of residence after that period forfeit a right already acquired. (Lawrence *v.* Phillips, 6 L. D., 140.)

The conclusion reached by the local officers and your office decision of November 24, 1896, dismissing Luellin's contest is affirmed.

R. M. SNYDER.

Motion for review of departmental decision of June 20, 1898, 27 L. D., 82, denied by Secretary Bliss, August 9, 1898.

RAILROAD GRANT—TIMBER CULTURE APPLICATION.

DREW *v.* NORTHERN PACIFIC R. R. CO.

The ruling of the United States Supreme Court in the Ard-Brandon case that the failure of a settler to appeal from the rejection of his application to enter did not defeat his rights, where he remained in the occupancy of the land, should not be extended to the case of a timber culture applicant, especially in view of the repeal of the timber culture law.

A timber culture application for land covered by a valid subsisting railroad indemnity selection creates no right that is protected under the saving clause in the act repealing the timber culture law.

Secretary Bliss to the Commissioner of the General Land Office, August 12, 1898.

(W. V. D.) (F. W. C.)

With your office letter of October 5, 1896, was transmitted a motion for review of departmental decision of July 23, 1896 (not reported), in the case of John Drew *v.* Northern Pacific Railroad Company, involving the NE. ¼ of Sec. 7, T. 17 N., R. 46 E., Spokane land district, Washington. This motion was entertained and returned for service by letter of November 16, 1896, and is again returned, with evidence of service, by your office letter of December 17, 1896.

The tract involved is within the indemnity limits of the grant to said company, and was included in the company's list of selections filed March 20, 1884 (list No. 3). This list was not accompanied by a designation of losses, but was protected by departmental order of May 28, 1883, which permitted this company to make selection without a designation of losses. The company was subsequently, under the order in the La Bar case (17 L. D., 406), required to file a list of losses for all previous selections made without designation. It has since filed a list of losses, the validity of which need not be considered in disposing of the matter now under consideration.

The present case arose upon the timber culture application of Drew tendered June 27, 1892. In support of said application he alleged resi-

dence upon the land continuously from the spring of 1881. It was shown, however, that he had exercised both his homestead and pre-emption rights prior to the company's selection of 1884, so that his claim rests solely upon his timber culture application, which was presented after the repeal of the timber culture law, and, independently of the question as to the right of the company under its selection, was properly rejected.

It is alleged, however, that prior to the offer of said timber culture application, Drew had filed two other applications under the timber culture law—one on July 3, 1883, and the second November 28, 1884. These applications were both rejected—the first on account of the indemnity withdrawal for this grant, which was then recognized.

From the rejection in 1883 Drew failed to appeal. From the rejection of May 28, 1884, an appeal was filed but the same was refused to be entertained by your office, because not served upon the company.

The only question raised by the motion for review worthy of consideration is as to the rights of Drew under these applications which were presented before the repeal of the timber culture law.

Since the decision of this Department in the case of the Northern Pacific Railroad Company *v.* Guilford Miller (7 L. D., 100), it has been uniformly ruled that the orders of withdrawal of indemnity lands on account of this grant were in violation of law and of no effect except to mark the boundaries within which selection might be made, and that lands within the indemnity limits were subject to other appropriation until duly selected on account of the grant.

The rejection of the first application presented by Drew in 1883, prior to the company's selection, was therefore erroneous, but from said rejection Drew failed to appeal.

It is true that in the case of Ard *v.* Brandon (156 U. S., 537), the court held, where the application of a settler to make homestead entry was wrongfully rejected and the party acting upon the advice of the local officers did not appeal but continued in the occupation of the land, that his rights were not affected by the fact that he took no appeal.

In the present case the party's right, if any he has, depends alone upon the timber-culture application presented, as before stated, on July 3, 1883.

By the act of March 3, 1891 (26 Stat., 1095), the timber-culture law was repealed. The only rights saved after the passage of said act were those covered by the proviso, which reads as follows:

> That this repeal shall not affect any valid rights heretofore accrued or accruing under said laws, but all *bona fide* claims lawfully initiated before the passage of this act may be perfected upon due compliance with law, in the same manner, etc.

I do not think it can be said that Drew secured any valid right by the presentation of his application in 1883, for the reason that the same was not prosecuted by appeal after its rejection. But on the contrary, the same would seem to have been abandoned by the tender of the

second application on November 28, 1884, and I do not think the holding made in the Ard-Brandon case, *supra*, should be so extended as to apply to this application, especially in view of the repeal of the timber-culture law. (See Tubbs *v.* Northern Pacific Railroad Co., 27 L. D., 86.)

The second application was properly rejected, the land having in the meantime been selected by the railroad company, which selection, as before stated, was not accompanied by a designation of losses, but was protected by the order of May 28, 1883, and was therefore a bar to Drew's second application. From this rejection he attempted to appeal, and even if the irregularity in the matter of the appeal be waived, it must be held that the rejection was a proper one, and that by this application he was not brought within the saving clause contained in the first proviso to section one of the act of March 3, 1891, *supra*, repealing the timber culture laws.

It is clear that no rights were gained by the third application, presented after the repeal of the timber culture law, and upon which, as before stated, this controversy arose. In view of the repeal of the timber culture law, the rejection of said application was warranted without considering the question as to the regularity of the company's selection.

The previous decision of the Department, sustaining the rejection of this application, is therefore adhered to, and the motion is accordingly denied.

It is not the intention of the Department by this action to in any wise pass upon the question as to the sufficiency or regularity of the selection made by the company covering this tract.

INDIAN LANDS—ALLOTMENT—ESTATE BY CURTESY.

ST. DENNIS *v.* BREEDAN.

Under the act of March 3, 1885, providing for the allotment of Umatilla lands, the laws of the State of Oregon, from the time of the issuance of the trust patents, determine questions of descent in the event of an allottee's death; and by such laws the husband of a deceased allottee is entitled to an estate by curtesy in the allotted lands.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, August 12, 1898. (W. C. P.)

I am in receipt by your reference, with request for an opinion on the question presented, of the letter of the Commissioner of Indian Affairs, dated November 1, 1897, and accompanying papers in the matter of the controversy between D. St. Dennis and Thomas Breedan as to the right of possession of the E½ of the NW¼ of Sec. 5, T. 3 N., R. 35 E., W. M., Oregon, being the lands allotted to Rosa St. Dennis, afterwards Breedan, a Umatilla Indian.

By the act of March 3, 1885 (23 Stat., 340), it was directed that lands

be allotted to the Indians upon the Umatilla reservation in Oregon. The provisions of that act as to patents are as follows:

> The President shall cause patents to issue to all persons to whom allotments of land shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the law of alienation and descent in force in the State of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided.

The land involved in this controversy was allotted to Rosa St. Dennis, who afterwards married Thomas Breedan, a white man. Said allottee died about December 1895, leaving surviving her her husband, Thomas Breedan, and three minor children, Lillie, Roy and Ralph Breedan. It seems that the surviving husband has remained in possession of the allotted land claiming the right thereto as tenant by the curtesy under the laws of Oregon. D. St. Dennis the father of the deceased allottee was appointed guardian of the minor children and invoked the aid of this Department to secure possession and control of said land. The matter was submitted upon an agreed statement setting forth the facts substantially as above stated and concluding with the following:

> This statement of facts is submitted to the Department for its decision as to who is entitled to the possession of said lands since the death of the allottee thereof; whether her husband, Thomas Breedan, or her father as guardian of her children.

The Commissioner of Indian Affairs on July 31, 1897, decided that Thomas Breedan, the surviving husband, is entitled to a life estate in said lands, whereupon an appeal was taken to this Department and the matter was referred to me for an opinion.

The statutes of Oregon (Hill's Annotated Laws of Oregon, 1887, Sec. 2983,) recognize the estates by the curtesy in the following language:

> When any man and his wife shall be seized in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life, as tenant thereof by the curtesy, although such husband and wife may not have had issue born alive.

Section 3098 of said laws provides that real property shall descend in equal shares to the children of the decedent, and section 3110 in the same chapter contains the following:

> Nothing contained in this chapter shall affect or impair the estate of a husband as tenant by the curtesy, nor that of a widow as tenant in dower.

The decision of the Commissioner of Indian Affairs refers to and follows a decision of the circuit court of Oregon for Umatilla county in a case involving a similar question. That court held that the surviving husband of a deceased allottee, who left children also, is an heir of such decedent under the laws of Oregon and entitled to have and hold all

the real property of the decedent during the time of his natural life. The complainant in that case in whose favor it was decided was D. St. Dennis, who is now seeking to secure a different construction of the law by this Department. It is asserted that the two cases are not alike because here it is admitted that the three minor children are the only heirs of the deceased allottee. This is not correct because the agreed statement simply states that the allottee died leaving surviving her, her husband and three minor children. It is further claimed that the decision of the circuit court should not be considered or followed because the decree was absolutely void for want of jurisdiction in the court and because that court is not one of final resort. It is true that the decision of that court would not necessarily be binding upon this Department as a precedent, and in view of this it is not necessary now to determine whether there was authority to render the decree there.

The general rule is that the right by curtesy attaches to an equitable as well as to a legal estate and this rule has been specifically announced by the supreme court of Oregon (Gilmore *v.* Gilmore, 7 Or., 374). The husband of a deceased allottee would be entitled to an estate by curtesy in the allotted lands of which his wife died seized unless the law under which she held title is to be construed as barring such an estate.

One of the objects in making allotments of lands to individual Indians is to break up the tribal relations and to place the allottees as far as possible upon the same footing as to property rights as their white neighbors.

It was, however, deemed necessary to continue for a period certain restrictions upon their use of the lands allotted and hence there was inserted in the law authorizing allotments a restriction against alienation for the period, in this case, of twenty-five years. It was, however, specifically provided that the heirship should be determined by the laws of Oregon and that the law of alienation and descent in force in that State should apply after patents should be issued except as otherwise provided. The exception is evidently as to the right of alienation during the period of twenty-five years. It might be claimed that the phrase "after patents have been issued" operates to defer the operation of the laws of Oregon as to alienation and descent upon these lands until after the final patents have been issued at the expiration of the period of twenty five years. But this would be against the general intention to bring these people under the operation of all the laws of the State as fast as practicable. The object of the proviso quoted above was to furnish a rule to determine the heirship in cases where the allottee should die before the issuance of the second or final patent. Upon the issuance of that patent the right of the allottee to the land became full and perfect, relieved of all control or supervision of the United States, and the Indian having become a citizen there could be no necessity for a declaration as to what laws of alienation and descent should thereafter control. It was the evident intention to make these

lands subject to the laws of the State of Oregon from the time of the issuance of the trust patents except as to the right of alienation.

After a careful consideration of the question submitted, I am of the opinion, and so advise you, that the surviving husband of this deceased allottee is entitled to an estate by the curtesy in the land in question.

The papers submitted are herewith returned.

Approved:

C. N. BLISS, *Secretary.*

RIGHT OF WAY—ACT OF MAY 14, 1896—FOREST RESERVATION.

CRYSTAL LAKE IRRIGATION AND POWER COMPANY.

In the case of an indemnifying bond furnished by an irrigation company, on application for a right of way across a forest reservation, where the surety is a company duly certified as authorized under the act of August 13, 1894, to act in such capacity, it is not necessary that such surety should furnish a statement as to its assets and liabilities.

The act of May 14, 1896, in granting a right of way across public lands and forest reserves "together with the use of necessary ground, not exceeding forty acres," while restricting the area that may be thus used does not limit such use to a single tract.

Secretary Bliss to the Commissioner of the General Land Office, July 29, 1898. (A. M.)

You transmitted to the Department with your letter of the 5th instant a certified copy of the articles of incorporation and proofs of organization of the Crystal Lake Irrigation and Power Company; also a map and other papers in the matter of its application for permission to use right of way under the act of May 14, 1896, 29 Stat., 120, and recommended that the papers be filed of record and that the permission asked for be given as to the even numbered sections of public lands.

The right of way involved in the application of this company lies within the limits of the San Gabriel timber land reserve and the company has stipulated that it will not cut timber other than is necessary for the proper occupation of the right of way and that the right of way will be located so as not to interfere with the proper occupation of the reservation by the government. This stipulation is supplemented by the report of the special forest agent and superintendent that the proposed right of way will not interfere with the proper governmental occupancy of the reserve nor with the enforcement of the rules and regulations for its care.

You have called attention to the bond furnished by the company in compliance with amended paragraph 11 of the rules and regulations governing forest reserves (26 L. D., 421), in the sum of $1,000, the amount fixed by your office, and to the absence of the statement of the assets and liabilities of the surety to the bond, which is the American Surety Company of New York.

On this point you have submitted the query whether this statement is essential inasmuch as the company has been certified as being qualified under the terms of the act of August 13, 1894, 28 Stat., 279, and in view of the fact that the bond is for the purpose of indemnification.

It is not deemed necessary that the surety should supply the statement, etc., referred to, for that is a requirement of the regulations respecting the bond that is required to accompany a contract and to ensure its faithful execution. It could add nothing to the sufficiency of the bond in this instance.

Your statement that the bond appears to be satisfactory, except as you have indicated, is held to be equivalent to your approval thereof as provided in the amended rule heretofore mentioned.

In the matter of the approval of a bond of this character it is directed that hereafter when one is submitted to your satisfaction it shall be endorsed with your formal approval.

You have further adverted to the fact that the odd-numbered sections affected by the right of way are within the overlapping limits of the Atlantic and Pacific and Southern Pacific Railroad grants held to have been forfeited by the decision of the Supreme Court, 168 U. S., 1.

In view of the instructions relating to the reservation of these lands it is your opinion that the application cannot stand as to the odd-numbered sections, hence your recommendation that the permission be confined to the even numbered sections.

The act authorizes the granting of permission for the use, in addition to the twenty-five feet right of way, of the "necessary ground, not exceeding forty acres, upon the public lands and forest reservations."

The ground which the company has designated for use is in four tracts aggregating 19.90 acres and this designation is held to be within the meaning of the act which does not confine the use of the necessary ground to a single tract, but restricts the area of the ground for the use of which it provides.

In accordance with your recommendation I have granted permission for the use of the right of way by my endorsement on the map to that effect.

The map and papers are returned herewith for filing.

RESERVOIR—SURVEY—DEFINITE LOCATION—CONSTRUCTION.

JOHN B. WILSON ET AL.

The dates of the survey and definite location of a reservoir are not essential, where the map is not filed until after construction.

Secretary Bliss to the Commissioner of the General Land Office, August 4, 1898. (A. M.)

Under cover of your letter of the 28th ultimo you submitted a map, with field notes of survey etc., filed by John B. Wilson and John D. Thompson under sections 18 to 21, act of March 3, 1891, 26 Stat., 1095.

The map shows the Rocky Reef, Elizabeth and Dry Creek reservoirs in Lewis and Clarke county, Montana, which were constructed in 1888. Their aggregate area is represented to be 1,590 acres and their aggregate capacity is estimated to be 3,200 acre feet.

You have called attention to the omission from the affidavit of the engineer of the date of the commencement and completion of the survey and to the omission from the certificate of the applicants of the date of adoption of the survey as the definite location of the reservoirs. In this connection you have expressed the view that as the dates of survey are mentioned in the sworn field notes and that as the above act of 1891 does not limit the time within which maps of reservoirs, etc., theretofore constructed may be filed, it is not necessary that the omissions be supplied. You have accordingly recommended the approval of the map.

The map of these constructed reservoirs is satisfactory as presented and the requirements as to dates of survey and of definite location which are imposed in case of maps of definite location filed in advance of construction are not essential to the disposal of the case before me. The applicants have certified that the reservoirs are desired for the sole purpose of irrigation and I have accordingly approved the map as recommended.

RESIDENCE—ABANDONMENT—LEAVE OF ABSENCE.

IRONS *v.* BALDOCK.

As between a settler, whose absence from the land is due to the sickness and necessities of his family, and an entryman who is not acting in good faith in the matter of complying with the law, the absence of such settler will not defeat his right as a prior settler on the land.

The leave of absence accorded by section 3, act of March 2, 1889, does not include settlers who have no claim of record.

Secretary Bliss to the Commissioner of the General Land Office, August 12, 1898.

(W. V. D.) (P. J. C.)

It appears that Albert W. Baldock made homestead entry of the SW. ¼, Sec. 22, T. 23 N., R. 6 W., Enid, Oklahoma, land district, on September 29, 1893, and on the following day Oliver L. Irons filed an affidavit of contest, alleging prior settlement.

A hearing was had and as a result the local officers recommended that the entry be canceled and Irons be permitted to enter the land.

On appeal, your office, by decision of January 31, 1896, affirmed the action below, but at the same time ordered a further hearing upon the application of Baldock upon a showing made by him that Irons had abandoned the land.

Service of notice of this hearing was made on Irons, and hearing was had before the local officers. In relation to Baldock they use the following language:

It further appears to be questionable whether or not Baldock has complied, in good faith, with the law as to his residence thereon; his improvements are very small,

and has done but little work thereon in more than two years' time for one who in good faith intends to make his homestead thereon, he has principally visited the land at night, sleeping there at night and returning to town the following morning, and his family, consisting of his wife, living in town as much, or more, than he did, and it not satisfactorily appearing from the evidence how much time he has actually lived upon the land, makes the question of his residence thereon very doubtful, but as he relies upon his entry and is not charged with the abandonment of said tract we are of the opinion that his entry should remain intact.

They recommended that Irons' contest be dismissed, on the ground that he had abandoned the land.

Irons appealed, and your office, by decision of October 7, 1896, held that the finding of the local office as to the want of good faith on the part of Baldock was borne out by the evidence; that Irons went to the local office before he went away "to get a leave of absence, and he was informed that he could not get one," and your office held that he

should not have been denied a leave of absence because he had not actually "filed," as he had done all he could, in the face of Baldock's existing entry, and asserted his prior right by filing his contest, which was equivalent to a "filing" in preserving his right.

The action of the local office was reversed; whereupon Baldock prosecutes this appeal.

On the facts as disclosed by the testimony at both hearings, your office substantially agrees with the local office, and from an examination of the record the Department concurs therein, that is, that Irons was the first *bona fide* settler on the land; that he remained there with his family from September 13, 1893, to April 20, 1895; that on the last named day he left the land with his family and part of his household effects and did not return till March 14, 1896; after the service of notice on him of the second hearing; that there was apparently no *bona fide* attempt made by Baldock to comply with the requirements of the homestead law, and whatever he may have done in that direction was a mere pretense.

From an examination of the testimony it is found that in your office decision the facts and circumstances which rendered it necessary for Irons to leave the land in order to support his family, and the misfortunes which detained him, are detailed with substantial accuracy, and it is not deemed necessary to recapitulate them here. It is sufficient to say that under the circumstances he would have been less than human not to have used any means in his power to relieve the threatened distress to himself and family at the time when he left the land, and the subsequent illness of his wife and children, and his inability to provide them with the comforts of life, were misfortunes that prevented his earlier return to the land.

There evidently was no intention on the part of Irons to abandon the land when he went away. He left most of his household effects in his house, and his farming implements, with the expressed intention of returning. According to the testimony of his physician, he did return as soon as his family was able to travel.

It is true he remained absent nearly a year, but this can not be taken advantage of by one who is not acting in good faith himself, as is found to be the case with Baldock. By simply having an entry on the land and for more than two years failing to evince an honest effort to comply with the requirements of the law, can not give an entryman any superior right over the claim of a prior settler who has honestly made all effort in his power to comply therewith.

The question of abandonment is very largely one of intent. It is clear Irons did not intend to abandon the tract. He returned and renewed, or established, his residence thereon prior to any *bona fide* residence on the part of Baldock and his (Irons') claim must be held to be superior to Baldock's.

The Department does not concur in the interpretation of your office of the act of March 2, 1889 (25 Stat., 854). Section 3 of said act provides that the register and receiver, for any of the reasons therein specified, may grant leave of absence to any settler "from the claim upon which he or she has filed." The fact that one is simply a settler without any claim of record, does not bring him within the purview of the statute. The General Circular (page 17) specifically prescribes what shall be shown by the applicant, and the first is: "the character and date of the entry."

For the reasons herein stated the decision of your office cancelling the homestead entry of Baldock is affirmed.

SETTLEMENT RIGHTS—ABANDONMENT—SALE OF IMPROVEMENTS.

DASHNEY *v.* PAGGANER.

The presumption of abandonment attendant upon the sale of improvements on a tract of public land, can not be overcome by a showing that such sale was procured through a fraud upon the rights of the vendor, where a third party, acting upon the evidence of such sale, in good faith thereafter purchases said improvements and makes entry of the land.

Secretary Bliss to the Commissioner of the General Land Office, August 12, 1898.

(W. V. D.) (H. G.)

John Dashney appeals from the decision of your office of November 2, 1896, dismissing his contest against the homestead entry of Jacob Pagganer, made July 16, 1894, for the SW. ¼ of Sec. 12, T. 11 N., R. 9 W., in the Vancouver, Washington, land district, and upon the day the township plat covering the said tract was filed in the local office.

Subsequently to such entry, Dashney filed his application to enter the tract, alleging settlement on the same prior to the settlement of the entryman. A hearing was had, and the testimony was taken before an officer duly appointed for that purpose, at which the parties appeared and submitted their evidence. In consideration of such evidence, the local officers found, substantially, that the contestant's settlement was

made prior to that of the contestee, but, as the contestant had, prior to the entry, sold his improvements upon the tract in controversy to one McDonald, who, in turn, sold them to the entryman contestee, the latter was an innocent purchaser in good faith, had established a permanent residence upon the tract, and had made substantial improvements thereon, and was entitled to enter the tract. The dismissal of the contest was accordingly recommended. Upon appeal, your office affirmed this decision and dismissed the contest.

The evidence discloses that the contestant made settlement upon the tract on or about March 31, 1891, prior to the survey of the township, cleared some of the tract, but as the lines of the survey had not been run, built a house upon an adjoining section, and made but few improvements upon the disputed tract—a clearing of a few rods in area. He intended, however, to settle upon the disputed tract, and thought he had done so. He was compelled to seek work away from the tract, and while engaged in a logging camp was severely injured. One of his legs was mangled by a log, and he was removed to a hospital, where he remained from May, 1891, until April, 1892. While in this condition, his labors upon the tract were of necessity suspended, but were resumed as soon as he was able to work, which was about four months after his discharge from the hospital.

After he had been disabled about six days, and on May 26, 1891, A. B. McDonald visited him at the hospital, and secured from him the following instrument:

Month of May 26th, 1891.
ASTORIA,

This is to certify that I have sold my improvements on southwest quarter of Sec. 12 to A. B. McDonald.

JOHN DASHNEY,
JOHN LYNCH.

McDonald took possession of the premises, but although a married man did not remove thereto with his family. He removed the cabin erected on the tract adjoining the land in controversy, and claims that he expended seventy-five dollars in improvements thereon. On March 11, 1892, he sold his improvements thereon to the contestee, Pagganer, for one hundred dollars in gold, and abandoned the tract. As before stated, Pagganer made his entry on July 26, 1894, the day when the township plat was filed, prior to the application of Dashney made on the same day. After the recovery of Dashney from his injury, he has resided upon the tract, and Pagganer has also resided thereon. Both of the parties have been compelled to work away from the claim in order to secure a livelihood and means to improve the tract.

The disposition of the case manifestly depends upon the effect of the instrument delivered by Dashney to McDonald, and by the latter surrendered to Pagganer at the time of the sale of the improvements by McDonald to Pagganer, as bearing upon the good faith of Dashney, the prior settler, and as indicating his intention to abandon the tract.

Dashney admits executing the instrument, but says that he did so without receiving any consideration whatever, and that no consideration was mentioned. He testifies that McDonald threatened to "jump" the claim, and that he executed the instrument while under great pain and suffering, and in order to get McDonald "out of the hospital." The instrument was written entirely by him, except as to the signature of John Lynch below his name. McDonald claims that the contract was that he should pay ten dollars down, and twenty dollars thereafter the first time he met Dashney, and that Dashney made no objection whatever to executing the instrument. McDonald does not testify directly that he paid ten dollars to Dashney, and the latter denies that he received any consideration whatever. It is admitted that twenty dollars of the alleged agreed price of the improvements have not been paid or tendered to Dashney, and have never been demanded.

Pagganer insists that he was induced to purchase the improvements of McDonald from the fact that the latter had in his possession the instrument purporting to sell the improvements, which was executed by Dashney. The house erected by Dashney and removed by McDonald to the tract was destroyed by fire and Pagganer had prior to its destruction erected another dwelling.

It is doubtful whether Dashney ever received any consideration for the sale. McDonald does not directly swear that he paid a part of the consideration upon the execution of the instrument, but testifies that he agreed to do so. Pagganer, however, insists that he relied upon this instrument, and the price he paid is evidence of his good faith and the lack of knowledge of the transaction between McDonald and Dashney which culminated in the execution and delivery of the written instrument of sale. Although Dashney was probably suffering from his injuries at the time he signed this instrument, yet he was able to write it out, and had possession of his faculties and was not under duress. His explanation that he did so in order to get rid of McDonald is hardly plausible, yet it does appear that he was imposed upon. However, he gave currency by this document to his abandonment of the claim, and he can not now object to the effect of such an instrument, which led another to believe that he had abandoned it and who acted upon such belief. The case is one of great hardship, and were the contest one between Dashney and McDonald, the rights of the former might have been protected, as the preponderance of the evidence seems to be that there was no consideration whatever for the improvements. Inasmuch, however, as Pagganer based his purchase from McDonald upon the instrument of sale, he stands in the attitude of an innocent purchaser for value without notice of the lack of consideration therefor.

While the general doctrine is that a buyer acquires by the sale no better title than his vendor had, even though he buy in good faith, for value and without notice, there are some exceptions to this rule—one

in the case of negotiable instruments purchased before maturity for value, and the other where a *bona fide* purchase of property has been made from a seller who has obtained it through fraud. This latter exception—the one applicable to the case at bar—is allowed, because the seller has invested the buyer with the possession and apparent ownership of the property and must suffer from his misplaced confidence, rather than the innocent purchaser, who has been misled in his reliance upon the apparent ownership of the fraudulent buyer. 21 Am. & Eng. Encyc. Law, 567, 569.

It is true that such contracts can not be enforced by the Department, but they may be inquired into to ascertain whether or not fraud was practiced upon the entryman or the one entitled to enter. The sale is merely evidence of abandonment, but if one is led to believe therefrom that the sale is legal and the claim has been abandoned, and purchases such improvements with the intent to enter the land, basing his belief upon the bill of sale of the first settler upon the tract, he ought to be protected. The sale of improvements upon a claim is tantamount to the abandonment thereof, where the right of its possession rests upon improvement as well as inhabitancy. The purchaser of such improvements in good faith has the right to assume that the vendor has parted with his right and possession to the claim, which were based upon such improvements.

Although no consideration is mentioned in the bill of sale, that omission does not affect its validity, as a consideration for the sale is presumed from the fact of the sale therein expressed.

The decision of your office dismissing the contest must be affirmed.

RIGHT OF WAY—ADDITIONAL STATION GROUNDS.

SANTA FE PACIFIC R. R. CO.

The right to take additional station grounds under section 2, act of July 27, 1866, can not be recognized in the absence of a satisfactory showing of the necessity for the use of such additional ground.

The grant of necessary lands for station and other purposes, outside of the limits of the general right of way, does not, like the grant of the general right of way, relate back to the date of the act making the grant; hence no rights are acquired, as against an adverse claimant, by an application for additional station grounds tendered in advance of actual use and occupancy and at a time when the lands are appropriated by an existing entry.

Secretary Bliss to the Commissioner of the General Land Office, August 12, 1898.

(W. V. D.) (F. W. C.)

With your office letter of May 20, 1898, was forwarded an appeal, filed on behalf of the Santa Fe Pacific Railroad Company, from the action taken in your office decision of January 15, 1898, in which it was held that no rights could be acquired by said company under its application

for additional station grounds at Bellemont, Arizona, and declining to accept the plat thereof or to submit the same for the consideration of this Department.

The plat under consideration was filed in this Department October 20, 1897, with letter of that date from C. N. Sterry, solicitor for said company, in which it was stated that:

> The additional station ground at Bellemont is desired on account of an extensive tie-treating plant which the company is about to build there and the building of which will necessitate additional facilities.

Relative to this plat, he said in a letter dated January 8, 1898, addressed to your office, as follows:

> We have, adjoining this station, put up a $50,000 tie-treating plant, and we need this ground constantly for the station work.

The additional ground applied for joins the station at Bellemont and comprises the balance of the NW. ¼ of the NW. ¼ of Sec. 2, T. 21 N., R. 5 E., not embraced in the present station grounds.

The right to take the ground applied for is claimed under section two of the act of July 27, 1866 (14 Stat., 292), making a grant to aid in the construction of the Atlantic and Pacific railroad, which provides as follows:

> That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds, for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turntables, and water-stations;

The present claimant is the successor in interest to the Atlantic and Pacific Railroad Company, having complied with the provisions of the act of March 3, 1897 (29 Stat., 622).

That the right exists under the above quoted act, where the land is desired for the uses specified in the act and the necessity for the use is made to appear, to extend beyond the two hundred feet of right of way otherwise granted by said section, has been already determined by this Department in the construction of a similiar provision in the act of July 1, 1862 (12 Stat., 489), making a grant to aid in the construction of the Union Pacific railroad. See Union Pacific Ry. Co., 25 L. D., 540.

The statements taken from the letters from the solicitor of the company, as to the uses desired of the additional land here applied for, are the only showing that has been made as to the necessity for the use of said land, and is in itself clearly insufficent to authorize the use of such land. In a brief filed, however, on behalf of the company, it is stated that the company "is now, and always has been, able to fully present rea ons that are conclusive for such necessity."

From the statements contained in your office decision appealed from, it appears that the records of your office show that this tract was included in the preemption declaratory statement, No. 1974, filed by Edwin Gale on December 14, 1887, alleging settlement December 10, 1887. On February 10, 1896, Charles J. Barry made homestead entry including said tract, which entry was canceled on relinquishment November 4, 1897; and on the following day Henry S. Buckner made homestead entry including said tract, which entry is still of record.

Your office decision treats the present application as an amendment of the definite location and holds that the same can not be considered as becoming effective until accepted by this Department; further, that it can not affect the rights of a settler who makes entry prior to the date of the acceptance of the amended location, and as authority therefor refers to the case of the Missouri, Kansas and Texas Railroad Co. *v.* Cook, 163 U. S., 491.

In your office decision it is stated:

> The question being as to the acceptance of an amendment of the definite location of the right of way, and the records of this office showing that Buckner has a prima facie valid and subsisting entry for the land involved, and that he made his entry without notice of the proposed amendment of the right of way, the application for which was not filed in the local land office, but directly in the office of the Secretary of the Interior, this office must hold that no rights can be acquired by the company upon the tract by the acceptance of the plat of additional station grounds; and must therefore decline to accept the plat, or to submit the same for the consideration of the Honorable Secretary, subject to the usual right of appeal within sixty days.

From this action the company has appealed.

It has been repeatedly held by the courts in the construction of grants made to aid in the building of railroads, that the grant of lands and the grant of the right of way are alike grants *in praesenti*, that the easement and the lands are a float until by definite location they become permanently fixed, and that even before definite location all persons acquiring any portion of the public lands after the passage of the act making the grant, take the same subject to the right of way for the proposed road.

In the case of the Missouri, Kansas and Texas Railroad Co. *v.* Cook, *supra*, referred to in your office decision, it was held by the court that:

> By the filing of the map of the line surveyed the route was definitely fixed, within the intent and meaning of the act, and while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right of way.

While station grounds may be shown upon the maps on which are delineated the line of definite location, as is often the case, yet from the very nature of things it must be apparent that it was not contemplated that the necessity for additional grounds for stations and other purposes named in the act should appear at the time the line of definite location was fixed. Where these additional lands would be needed

and the amount thereof would depend largely upon the settlement and development of the country along the line of the road after it had been constructed.

The grant of necessary lands for station and other purposes may therefore be likened to the grant of indemnity of lieu land, provision for which is generally found in the grant of lands made to aid in the construction of railroads. Relative to such lands it has been uniformly held by the courts, since the case of Ryan *v.* Railroad Company, 99 U. S., 382, that the right is only a float and attaches to no specific tract until selection has been made in the manner prescribed in the act making the grant.

Within the limits prescribed for the right of way, proof of occupancy and use is not necessary, for, as said by the court in the case of Northern Pacific Railroad Company *v.* Smith, 171 U. S., 260–275,—

> The finding of the trial court, that only twenty-five feet in width has ever been occupied for railway purposes, is immaterial. By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants.

In the matter of the grant of additional lands for station and other purposes, the grant depends upon a contingency, which may or may not arise, namely, that the demands of the road for the purposes named make it necessary to occupy and use lands outside of the limits of the general right of way provided for. For these reasons it would seem to follow that the grant of necessary lands for station and other purposes, outside of the limits of the general right of way, the grant of which is not dependent upon such a contingency, does not, like the grant of the general right of way, relate back to the date of the act making the grant, so that persons acquiring any portion of the land after the passage of the act take the same subject to the grant.

Upon the contingency arising, it may be that the company would be entitled to at once enter into the possession and use of the lands needed, they being at that time free from other disposition, or, should it so desire, might formally apply for such additional lands in advance of occupation and use of the same, its application being accompanied by a showing as to the uses for which the same is desired and the necessity therefor.

As to these additional lands made necessary for the purposes named in the act, there is no express provision contained therein requiring the filing of a map or plat thereof, but the necessity for the filing of such a map arises from the fact that the ground desired must be identified and from the further fact that only the right to take ground necessary for the purposes named is granted, and an affirmative showing of such

necessity must be made to the Secretary of the Interior, who is charged with the administration and disposition of the public lands under the laws of Congress.

In the case of the St. Paul, Minneapolis and Manitoba Railway Co. *v.* Maloney *et al.*, 24 L. D., 460, it was held that the approval of a plat of station grounds would be given as against an intervening homesteader where it was shown that the company had entered upon and used the land prior to the filing of its plat, if the use by the company was shown to antedate the settlement or initiation of the claim of the homesteader.

In the present case the company is not shown to have been in the actual possession and use of the land prior to the allowance of Buckner's entry. Its claim seems to rest upon an application seeking to appropriate the land in advance of the use, the same being unaccompanied by such a showing of the necessity for the taking as would warrant the allowance of the application.

The plat filed by the company shows that it has already appropriated station grounds at Bellemont, 1200 feet by 6000 feet, including the right of way, and that the land now applied for is in addition thereto. Whether any such showing has been made as warrants the appropriation of such an amount of land for station purposes, the record now before the Department does not disclose. It is alleged, however, in an affidavit by Buckner.—

> That the said Santa Fe Pacific Railroad Company is now attempting to abandon the lands laid out heretofore for station grounds at said Bellemont station and to leave the right of way and pass over the station grounds as heretofore laid out for a distance of about six hundred feet south of the main line of said Santa Fe Railroad, and onto the land of the affiant.
>
> That said extension of said station grounds is not for any use in connection with the running of said railroad, but for the purpose of acquiring grounds on which to operate a Pickling Plant, which ground now sought to be used is on the lands of affiant.

Upon the record as made, therefore, it must be held that no rights were acquired by the tender of its application at a time when the land was not subject to such application, being already appropriated by an existing entry.

For these reasons the action of your office in refusing to entertain the application, upon the showing made, is affirmed.

STATE SELECTION—CERTIFICATION—MINING CLAIM.

Manser Lode Claim.

The certification to the State of Nevada of a tract of land selected under the grant of June 16, 1880, but of known mineral character and appropriated as such at date of selection, is null and void and consequently no bar to the subsequent recognition of rights asserted under the mining laws.

The finding of a federal court of competent jurisdiction, in a suit to recover possession between a mineral claimant and one claiming under a certification to the State, that the land in fact was of known mineral character and appropriated as such at date of selection, though not conclusive upon the United States, may, in the absence of objection, be accepted, if final as determining the character of the land and its status under the State selection.

Secretary Bliss to the Commissioner of the General Land Office, August 12, 1898.

(W. V. D.) (E. B., Jr.)

Your office letter of April 7, 1898, submits for the consideration of the Department and such direction as may seem proper in the premises, the papers and a statement of facts in the matter of the Manser lode claim, survey No. 1741, Carson City, Nevada, mineral entry No. 520, made September 2, 1897, by the Silver Peak Mines, a corporation.

The claim as embraced in said survey is the northerly 352.8 feet of the Manser location, which was made June 19, 1888. The application for patent was filed May 3, 1897. The ground entered is within the NE. ¼ of the NE. ¼ of section 22, T. 2 S., R. 39 E., M. D. M. The entire E. ½ of the NE. ¼ of said section was, on September 30, 1887, selected by the State of Nevada under the grant made to it by the act of June 16, 1880 (21 Stat., 288), which selection was approved by the Secretary of the Interior, and on August 8, 1890, the land was certified to the State. On May 22, 1891, the State conveyed the said NE. ¼ to one Alexander Morrison, who, on June 29, following, conveyed the same to one A. Garrard.

The said grant was for two million acres for common school purposes, in lieu of the sixteenth and thirty-sixth sections in each township, and by the second section of the act it is provided:

The lands herein granted shall be selected by the State authorities of said State from any unappropriated, non-mineral, public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this act the same shall be duly certified to said State by the Commissioner of the General Land Office and approved by the Secretary of the Interior.

In view of the certification to the State, your office, on January 8, 1898, called upon the lode claimant to show cause, within sixty days from notice, why the entry should not be canceled. The applicant filed its sworn answer, alleging, among other things, that the land embraced in said entry is mineral in character and had been known to be such since the year 1865; that the said NE. ¼ is now, and since the year last mentioned has been, in the peaceable possession of the applicant and its grantors as a salt claim, located and surveyed as such that year in accordance with the laws of Nevada, and that they had erected thereon permanent improvements costing between $75,000 and $100,000; that both said Morrison and said Garrard, at the time of their respective purchases from the State well knew that said land was in the possession of the applicant and that it had made valuable improvements thereon; "that the rights of said A. Garrard and this applicant, the

Silver Peak Mines, have been litigated and judgment rendered in favor of this applicant and against said A. Garrard"; that the applicant is the transferee of D. M. Brunton, the locator of the Manser claim; and that valuable mineral-bearing ore or rock has been discovered in a tunnel on the portion of said claim embraced in the said entry: wherefore the applicant prays that patent issue to it upon the claim as entered.

In support of its allegations the applicant filed the affidavits of two persons, who therein swear to the discovery in said tunnel of a quartz ledge bearing gold, silver and other precious metals; and a duly certified copy each of the complaint, answer, findings of fact, conclusions of law, judgment and opinion of the court, in an action of ejectment decided in August, 1897, in the circuit court of the United States for the district of Nevada, wherein the said Garrard was plaintiff and the said Silver Peak Mines and others were defendants, to recover possession of the forty-acre tract herein first above described. In said action the plaintiff claimed as transferee under the grant and certification to the State; the defendants resisted upon the grounds, so far as the land now embraced in said entry is concerned, that the land was mineral in character and was lawfully in possession of themselves and their grantors long prior to the grant and certification to the State, and therefore it was not subject to the grant, and that the certification to the State was procured through fraud and misrepresentation. The court's decision is in favor of the defendants, it being found therein, among other things, that the land was known to be mineral in character at and prior to its said selection and certification; that it had been in the possession of the applicant here and its grantors since 1865; and that these facts were known to the grantees of the State when they purchased. It was therefore held that, as mineral and appropriated land, the same was not within the terms of the granting act, and the selection and certification were without authority of law and therefore passed no title from the United States (Garrard *v.* Silver Peak Mines *et al.*, 82 Fed. Rep., 578). The question now presented is whether, in view of the foregoing, the title to the land embraced in said entry may be regarded as still in the United States and subject to the claim of the said applicant; or whether there should, notwithstanding, be had a hearing to determine the facts as to the character and condition of the land at the date of the State's selection, as a basis for further action relative to said entry.

A court of the United States, and of competent jurisdiction, has declared the selection and certification of no effect for the reasons stated. It has specifically found after full and careful investigation that the land was appropriated at the date of the selection and was mineral land and therefore not of the character contemplated by the grant. While not conclusive upon the United States, the judgment of the court is evidence of a high order both as to the character and condition of the land involved and the validity of the applicant's claim

thereto. It will be assumed for purposes of present consideration, and in the absence of any evidence to the contrary, that the said judgment is a final judgment between the parties thereto.

The said certification is subject to the provisions of the act of August 3, 1854 (10 Stat., 346), which, as carried forward into the Revision of 1873, as section 2449 thereof, read as follows:

> Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of his office, either as originals or copies of the originals or records shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

If, as would appear to be the case, the land embraced in the said entry was known mineral land at the date of said selection and appropriated as such, then, under the terms of the grant, it was excluded from selection, and by the express provisions of the section last above set out, not being of the character embraced by the granting act, "and not intended to be granted thereby," its selection and certification were "perfectly null and void and no right, title, claim, or interest" was "conveyed thereby." See in connection, Weeks *v.* Bridgman, 159 U. S., 541; English *v.* Leavenworth, Lawrence and Galveston R. R. Co., 23 L. D., 343; Stokes *v.* Pensacola and Georgia R. R. Co., 24 L. D., 396; and Scott *v.* State of Nevada, 26 L. D., 629. In the case last cited, construing together said section 2449 and the provisions of the granting act in question, the Department said:

> Under this act the land which the State is authorized to select must be "unappropriated, non-mineral, public land." If it is "appropriated" at the date of the State selection, then it is not of the character contemplated by the grant, and a certification thereof to the State would be null and void, and would not divest the Department of its jurisdiction over the land.

It follows that the same conclusion must be reached if the land were shown to be mineral at the date of the State's selection, and, *a fortiori*, the same, where, as in the present case, it was apparently both mineral and appropriated land.

No one is now objecting to the issuance of patent pursuant to said entry. During the period of publication (which ended in July, 1897) said Garrard filed a protest against the application, but the same was rejected on July 1, 1897, by the local office, and no appeal was taken therefrom; nor has Garrard made any further objection before the land department to the issuance of patent. Due notice to all concerned having been given by the applicant for patent, with the result indicated, it does not seem to the Department, in view of the findings and decision of the court, that any justification exists for the ordering of a hearing.

Before passing the entry to patent, however, and subject, also, to such further requirements, not inconsistent with the views herein expressed, as your office may deem necessary, you will require the applicant to furnish proper evidence that the judgment of the court was final upon the matter litigated; or, if such be not the fact, your office will stay proceedings therein until a final judgment has been reached in the court. Herewith are returned the papers.

APPLICATION FOR SURVEY—RIPARIAN RIGHTS—NAVIGABLE RIVER.

JOHN J. SERRY ET AL.

The purchaser of a meandered fractional tract takes to the water line, and if the Department has any authority thereafter to order a resurvey of such land, it should only be exercised in exceptional cases, on a clear showing of flagrant mistakes and disregard of regulations in the execution of the original survey.

The interests of the government as a riparian proprietor cease on the sale of a meandered tract; and all accretions to such tract, after survey and prior to sale, pass to the purchaser, and accretions thereafter become the property of the riparian owner.

Where a sudden change occurs in the course of a navigable river that forms the boundary between a State and a Territory, the reliction lying within the State is not the property of the United States, or subject to survey as such; but that portion of the abandoned bed of the stream lying within the territory is the property of the United States and therefore subject to survey.

Secretary Bliss to the Commissioner of the General Land Office, August 12, 1898.

(W. V. D.) (W. C. P.)

With your office letter of April 27, 1897, there were transmitted the papers in the matter of the application of John J. Serry, *et al.*, for the survey of certain lands alleged to be unsurveyed public lands and described as being north and east of the meander line of lots 1 and 2, Sec. 11, lot 1, Sec. 12, lots 1, 2, 3 and 4, Sec. 13, and lot 1, Sec. 24, Tp. 32 N., R. 4 E., Nebraska, with accretions and additions including the abandoned bed of the Missouri river in sections 10, 11, 12, 13, 14, 15, 16, 21, 22 and 24 in said township. Your office recommended that said application be denied.

The government survey of this township was made in 1857 and 1858 and the plat made from the field notes of that survey shows that sections 11, 12, 13, 15, 21, 22 and 24 were returned as fractional because of abutting on the Missouri river. The affidavits in support of the application here allege that the lines of that survey did not extend to the river but ended at a slough, leaving between the meander line thus established and the true bank of the river a strip of unsurveyed land in sections 11, 12, 13 and 24, ranging in width from forty rods to three quarters of a mile. That the land thus omitted was at the time of the survey almost as high as that at the meander line and was partly covered with a growth of willows; that between the date of the survey

and 1881 this strip had gradually increased in area until at the latter date there was a body of over one thousand acres of land between the meander line and the river. It is further stated that in 1881 the river suddenly sought a new channel south of the sections in question whereas it had formerly been north and east of them. A plat filed with the petition shows that part of the land adjacent to fractional sections 11 and 12, alleged to have been excluded from the survey to be a narrow strip not more than forty rods wide at the widest part and containing perhaps sixty acres. The land adjacent to fractional section 13 is according to said plat about half a mile in width at the widest place and contains about two hundred acres, while that in section 24 is a narrow strip of about twenty acres.

If the lots bounded by the meander line in question were still the property of the United States, the allegation that a large body of land had formed between such meander line and the river would justify a further investigation, and if such allegation were found to be correct then such land should be surveyed and platted as government land. In the present case the lots adjacent to the land here claimed to be unsurveyed public lands, and which were returned as fractional by the public survey of this township were long since disposed of in accordance with that survey and the plat based thereon showing them as bordering upon the Missouri River.

The law governing the survey of public lands now embraced in sections 2395, 2396 and 2397 of the Revised Statutes provides that, in those townships made fractional by reason of abutting upon water courses the boundary lines intersecting such water course shall be extended to the water which in such cases constitutes one of the boundary lines of such fractional section or lot. The law does not specifically require that a line connecting the points at which the side lines meet the water course shall be run, yet this is usually done to mark the meanders of the stream and to determine the quantity of land in the fractional section or lot to be disposed of. Such meander line is not, however, a boundary line for the water itself constitutes the boundary in such cases. Frequently if not usually the meander line thus run does not coincide exactly with the water line but this fact does not change the rule that the purchaser of such a fractional tract takes to the water line. In the case under consideration the land which it is claimed was omitted from the survey, if there was any, was apparently low sand bars or flats, subject to overflow and worthless for the purposes of cultivation at the date of the survey. The survey was made in 1859 and stood unchallenged as to its correctness for nearly forty years. During that period the surrounding country had been settled and improved until it had become one of the finest agricultural sections of the west, the land having greatly enhanced in value. Undoubtedly land in that vicinity had been bought and transactions involving large pecuniary interests had been made upon the faith of

the government survey, and the plats based thereon, which showed that these fractional lots extended to the river. That is, these lots were bought from the government upon the faith of the statement that they had a water front and have for many years been bought and sold among individuals under the same conditions. If there be any power in this Department under such circumstances to disregard the former survey and make a new one that power would be exercised only in exceptional cases where the utmost disregard of rules and regulations and flagrant mistakes in the execution of the former survey were disclosed. No such condition is exhibited here. The land alleged to have been left between the meander line and the water was not of great extent and was of little value either present or prospective at the date of that survey. Such strips and points as according to the showing here existed outside the meander line are not unusual, but this fact does not change the rule that the water constitutes the true boundary. Taking the allegations made in support of this application as true yet there does not appear to have been any serious mistake in the survey of this township, and the lands having been disposed of upon the faith of that survey there is neither reason nor authority for making another survey because these small portions of land remained outside the meander line run in connection with that survey.

The fact that the land between the meander line and the water had largely increased between the date of the survey and 1881, affords no grounds for a survey of said land as property of the government. When the fractional tracts were disposed of the United States ceased to be riparian proprietors. Any accretion made after the survey and prior to sale by the United States passed to the purchaser and accretions after such sale became the property of the riparian proprietor. These propositions are too well established to need further discussion at this time. Jefferis *v.* East Omaha Land Co. (134 U. S., 178), Harvey M. La Follette *et al.* (26 L. D., 453).

In this case the accretions were so far as the facts are disclosed, gradual and imperceptible and hence there is no question here as to what would have been the rights of the riparian owners if the recession of the water had been sudden. It has been contended that because of the rapid changes of the banks of the Missouri the doctrine of accretion should not be applied to this river, but the question has been definitely settled to the contrary by the supreme court. Jefferies *v.* East Omaha Land Co., *supra;* Nebraska *v.* Iowa (143 U. S. 359).

The application embraces the abandoned bed of the Missouri river. One of the boundaries of the State of Nebraska fixed by the act of April 19, 1864 (13 Stat., 47) is described as running from the junction of the Niobrara river with the Missouri river "down the middle of the channel of said Missouri river and following the meanderings thereof to the place of beginning." This description includes the boundary line along the locality in question here. Whether the purchasers of

the lands bordering upon the stream took to the middle of the stream or only to the edge of the water is not material here. If the purchaser did not take the land under the navigable water the State did take it, so that in either case the United States have no rights in the premises.

That the sovereignty over land under navigable waters vests in the respective States, and that the ownership thereof is to be determined by the laws of the States, has been held by the supreme court in numerous cases. Pollard *v.* Hagan (3 How., 212); Barney *v.* Keokuk (94 U. S., 324); Hardin *v.* Jordan (140 U. S., 371).

If a stream constituting the boundary between two States should change its course gradually the thread of the stream still remains the boundary, but if there be a sudden and rapid change in its channel by reason of which it abandons the old bed and seeks a new course the boundary does not change but is marked by the old channel thus abandoned. This question was thoroughly considered and definitely settled by the supreme court in Nebraska *v.* Iowa (143 U. S., 359).

The land in the abandoned bed of the Missouri river on the Nebraska side of the channel is not the property of the United States and is not subject to survey as such. The petition so far as it relates to these lands must be denied. This conclusion is reached upon the presumption that the change in the course of the river in 1881 was sudden, and the facts so far as they are disclosed support this presumption.

It would seem that, under the rulings of the supreme court, the land on the Dakota side of the former bed of the Missouri river and which was left exposed by the change of the course of the river in 1881, should be held to be public land of the United States, and as such subject to survey and disposal. It has been repeatedly asserted that the United States has never attempted to convey title to land under navigable waters by the disposal of land bordering on such waters. Sovereignty of such lands belonging to the States. In this instance the water had disappeared before the State of South Dakota came into existence, and the land which had formerly formed the bed of the river was then dry land. The facts as to the quantity of such land and its location are not sufficiently presented to justify any conclusion at this time as to advisability of directing a survey thereof. The plat filed indicates that a considerable portion of the Dakota side of the former bed of the Missouri river is now the bed of the Vermillion river and covered by its waters. Under these circumstances the application will not be granted as to this land.

For the reasons herein given the recommendation of your office that said application be disallowed is approved, and it is so ordered. This action will not, however, be held to prevent a survey of the Dakota side of the former bed of the Missouri, if hereafter facts shall be presented that justify such action.

SETTLEMENT RIGHTS—SOLDIERS' DECLARATORY STATEMENT.

CHAPPELL *v.* CLARK.

A homesteader who files a soldier's declaratory statement thereby waives any prior settlement he may have made on the tract embraced in his filing, and can not thereafter take advantage of such settlement as against an intervening adverse claimant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 13, 1898.* (H. G.)

Edward Clark appeals from the adverse decision of your office of July 9, 1896, wherein his homestead entry, made February 8, 1894, for the NE. ¼ of Sec. 30, T. 20 N., R. 8 W., in the Enid, Oklahoma, land district, was held for cancellation and the homestead entry of Theodore L. Chappell, the contestant, made October 30, 1893, for the same tract, subject to the soldier's declaratory statement filed by said Clark thereon September 29, 1893, was held intact.

March 8, 1894, Chappell filed his affidavit of contest, alleging priority of settlement on the tract involved, and that he settled thereon before Clark filed his said declaratory statement.

A hearing was had at which the parties appeared, in person and by counsel. The local office, upon consideration of the evidence adduced at such hearing, found that Chappell, the contestant, was the "prior bona fide settler" upon the tract in dispute, and that his settlement was prior to the date upon which Clark filed his soldier's declaratory statement therefor. Your office, upon appeal, did not consider it necessary to go into the testimony introduced by Clark to show that he also made settlement on the land on September 16, 1893, the day of the opening of the tract and adjacent lands to settlement, on the ground that even if it were conceded that he was the first to settle on the land, it could not avail him anything, as he failed to assert his right until he made his entry, February 8, 1894, more than four months after he claims to have made his settlement, and the cases of Wood *v.* Tyler, 22 L. D., 679, and Pickard *v.* Cooley, 19 L. D., 241, are cited as supporting this view of the case.

The testimony taken at the hearing is conflicting and irreconcilable. The contestant, Chappell, testifies that he made settlement upon the tract five minutes after noon of September 16, 1893, the opening day, starting on horseback from a point in section 32 of the same township, and that he placed stakes and flags on it, and on the next day built a brush arbor near the southeast corner of the tract. Shortly thereafter, he commenced the erection of a house, to which he removed his family. He was daily present upon the tract following his settlement engaged in making improvements, and was prevented from the removal of his family for some time by the sickness of his child.

Clark testifies that he staked the tract at a time which must have been later than that fixed by Chappell, but he and nearly all of his witnesses assert that Chappell was not on the tract and did not erect the temporary structure mentioned until some time after the opening.

An attempt was made to show that Chappell had staked and claimed the quarter section adjoining the tract on the east, but although one of the witnesses for the latter was somewhat confused as to the description of the land, it is clear that Chappell settled upon and claimed the tract in dispute. One of the witnesses for Clark, who was present when Chappell staked, is of the belief that the latter was east of the tract in controversy when he staked, but the testimony of this witness seems to be a matter of conjecture, and is overcome by the testimony of others who made the race with Chappell. The latter was clearly in advance of others in the race, and was the first to reach the land in controversy.

Both of the parties have made substantial improvements upon the tract and established their residence thereon, but Chappell was the first to do so, and his priority in that respect antedated the establishment of Clark's residence thereon and the filing of his soldier's declaratory statement.

As it appears that the preponderance of the evidence is in favor of Chappell as the prior settler, and that he followed his settlement by establishing his residence on the land within a short time thereafter, it is unnecessary to discuss the other questions raised.

However, as Clark filed his soldier's declaratory statement on September 29, 1893, at a date when Chappell had undoubtedly settled upon the tract, it follows that the cases cited in your office decision are decisive of the case, even if Clark had been the prior settler, as he thereby waived any prior settlement made upon the tract, because his right to make settlement dated from such filing, and he can not now, as against an intervening adverse claimant, take advantage of a settlement made prior thereto. He appears to be an illiterate man, and may not have clearly understood his rights at the time he made his selection through his agent for the tract, when he filed his soldier's declaratory statement. However, the evidence taken at the hearing discloses that the priority of settlement is in favor of the contestant, as the local office found.

The decision of your office, holding the entry of Clark for cancellation and directing that the entry of Chappell should remain intact, is therefore affirmed.

ALASKAN LAND ACT OF MAY 14, 1898.

G. P. HANSEN (On Review).

An application to purchase Alaskan land under the provisions of section 12 act of March 3, 1891, can not be perfected under the proviso to section 10, act of May 14, 1898, if the claim so presented under the act of 1891 was not authorized thereby.

Secretary Bliss to the Commissioner of the General Land Office, August 23, 1898.

(W. V. D.) (E. F. B.)

This motion is filed by G. P. Hansen for review of the decision of the Department of April 26, 1898 (26 L. D., 568), rejecting the application

of said Hansen to purchase the tract of land embraced in Alaska survey No. 62, under the 12th section of the act of March 3, 1891 (26 Stat., 1095), providing for the disposal of lands in said territory occupied for the purpose of trade and manufacture.

The application was rejected because the only business engaged in by the claimant is catching fish in the waters of that vicinity, for the Bartlett Bay Packing Company, and the only use and occupancy of the land is for domiciliary purposes and for the storage of nets and seines in the small cabin, used as a lodging place, which cannot be deemed occupancy of the land for the purpose of trade and manufacture within the meaning of the act of March 3, 1891.

The errors assigned in the motion are, substantially, upon two grounds:

First. In holding that the 12th section of the act of March 3, 1891, is limited in its scope to trading posts and manufacturing places, and that sheds, nets, piling, and other personal property used by claimant in the legitimate business of fishing are not improvements within the meaning of the act.

Second. In not holding that this application is brought within the terms of the act of May 14, 1898 (Public No. 95), by the addition of the words "or other productive industry," and in not suspending the survey to have it corrected in accordance with the requirements of the act of May 14, 1898, and when thus corrected in not holding that it was confirmed by said act.

The only evidence in support of this application is the report of the United States deputy surveyor, in which he says:

> The land embraced in this tract has no value whatsoever except as a fishery station, being used as such by Mr. Hansen. He has improvements which I estimate did not cost less than $1500.00, being a frame lodging and store house, fitted up with bunks, stove and utensils, piling for handling fish, boats, nets, etc.; he is engaged in catching salmon for the Bartlett Bay Packing Co., and employs a number of employees; he had this survey made to extend to the boundaries he had established by setting stakes and marking corners with a view of protecting himself from intrusion.

Upon this testimony it was held that the claimant did not occupy the tract for the purpose of trade and manufacture, and no reason is shown by this motion why the decision should be disturbed, so far as it holds that the occupancy of a tract of land by one engaged in catching fish is not for the purpose of trade and manufacture within the meaning of the act of March 3, 1891.

But the claimant insists that his application should now be disposed of under the provisions of the act of May 14, 1898 (Public No. 95), the 10th section of which supersedes the 12th and 13th sections of the act of March 3, 1891.

The act of May 14, 1898, enlarges the provisions made by the act of March 3, 1891, for the disposal of lands in the territory of Alaska, occupied for the purposes of trade and business, by the addition of the words "or other productive industry," which extends to all citizens of

the United States occupying lands in said territory in the pursuit of any productive industry the right to purchase one claim, not exceeding eighty acres, upon submitting proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry.

In disposing of this motion, it is unnecessary to determine what business or pursuit would come within the term "or other productive industry," since the claim cannot be perfected under the proviso to the 10th section of the act of May 14, 1898, for the reason that it was not a claim *lawfully* initiated prior to January 21, 1898.

The proviso is as follows:

That all claims substantially square in form and lawfully initiated, prior to January twenty-first, eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said act, but subject to the requirements and provisions of this act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods.

The proviso refers to claims which were authorized by the act of March 3, 1891, and which had not been completed at the date of the act of May 14, 1898, but it was not intended to validate any claim not authorized by the act of March 3, 1891.

The motion for review is denied, and the papers are returned to your office, with instructions to notify claimant that upon application being made in accordance with the instructions issued under the act of May 14, 1898, it will be considered.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

UNITED STATES *v.* CUNNINGHAM.

The amendatory act of January 23, 1896, dispensing with the requirement of actual residence on the part of applicants under section 3, act of September 29, 1890, where the land is fenced and improved, does not authorize an entry where the land is within a large enclosure constructed and maintained by several persons for their use in common, and the only improvements are of a temporary character.

Secretary Bliss to the Commissioner of the General Land Office, August 23, 1898.

(W. V. D.) (G. R. O.)

Your office under date of July 10, 1891, held for cancellation cash entry No. 4270, of Charles Cunningham, made under act of September 29, 1890 (26 Stat., 496), for the N. ½ of Sec. 25, T. 1 N., R. 29 E., La Grande, Oregon. This was done on the report of a special agent, charging, in substance, that the land was occupied by Allen Vogal and that Cunningham had not been in possession of the land since 1880, and had never had peaceable possession of the land at any time, never settled upon it, and never made the improvements claimed by him, and that he had made no application to purchase the land from the railroad

company, and had, at all times, yielded to the claim of Vogal to the land.

On the application of the entryman a hearing was ordered on December 4, 1891, and testimony was submitted on behalf of the government and of the entryman on November 21, 1895. On March 17, 1896, the local officers rendered a decision, recommending the cancellation of Cunningham's entry. On appeal, your office, on September 28, 1896, affirmed this decision. The entryman now appeals to this Department.

The land was originally embraced in the grant to the Northern Pacific Railroad Company, and under said act of September 29, 1890, became forfeited to the government. Section 3 of said act provided for the disposal of the forfeited lands to those persons who were

> In possession of the lands under deed, written contract with, or license from the State or corporation for which such grant was made (or who had) settled said land with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress.

While Cunningham states in his testimony that he had made application to purchase the land from the railroad company, which sent him a license to occupy the land such as it gave to all settlers on its lands in that vicinity, and that said license had been destroyed by fire, yet there is reason to believe that no such license was issued. No record of such application appears on the record book of settlers' applications kept by the company. Besides this, it is shown that such a license to occupy this land was granted to one Alonzo J. Hayward in 1881, and was by him assigned to L. A. Vogal in 1883. Vogal has used the land ever since, in the same way that Cunningham has used it, as a watering-place for sheep, and his right so to use it has never been disputed by Cunningham. Furthermore, in applying to purchase the land Cunningham did not claim a right because of any deed, contract or license with the railroad company. It is evident that he does not belong to the first of the classes mentioned in the act.

It appears, also, that he had never "settled" upon the land with *bona fide* intent to purchase it from the Railroad company. He had a rude cabin there which he used only as a temporary stopping-place for his sheep-herders. He had also dug a well upon the land and used it as a watering-place for his sheep, which he grazed there for a short season each year. Several other men used the land during all of this time for the same purpose and one of these, L. A. Vogal, had improvements upon the land similar to Cunningham's, and had secured a license from the railroad company to occupy it. It is difficult, under all the circumstances, to believe that Cunningham, on September 29, 1890, had "settled said land with bona fide intent to secure title thereto by purchase" from the railroad company. In the case of James C. Daly on review (18 L. D., 571), it was said:

> There can be no such thing as "settlement" disassociated with "residence." Although "settlement" may precede "residence," yet it must be with a view to

residence. The going upon or improvement of land, otherwise than with a view to residence "within a reasonable time thereafter" may be "occupation," but not "settlement."

This language is quoted with approval in the recent case of Jussila *v.* Carratt (26 L. D., 633).

At the time he applied to purchase this land, therefore, Cunningham was not a "settler" upon the land and had no right to make the entry. Neither is he protected by the amendatory act of January 23, 1896, (29 Stat., 4). That act dispensed with the requirement of "actual residence" upon the lands and gave the right of purchase to persons otherwise within the provisions of the act of September 29, 1890 who have "fenced, cultivated or otherwise improved" the lands. The land in controversy was within a large enclosure constructed and maintained by several different parties, and it was used indiscriminately by all of them. The improvements were of small value and it is evident that as far as placed there by Cunningham they were only for temporary use in connection with his sheep business, and not with a view to making a settlement upon the land, nor for the purpose of establishing such a claim to it as would give him a preference right to purchase it from the railroad company. It must be held that Cunningham was not qualified to enter the land under the act of September 29, 1890, and his claim not being protected by the act of January 23, 1896, his entry will, therefore, be canceled.

Your decision is affirmed.

Crawford *v.* Study.

Motion for review of departmental decision of May 28, 1898, 26 L. D., 708, denied by Secretary Bliss, August 23, 1898.

PRACTICE—MOTION FOR REVIEW—NOTICE OF DECISION.

Pryor et al. *v.* Couch.

When two or more parties are each entitled to file motion for review of a departmental decision, and one of them files such motion, it should not be transmitted to the Department for consideration until a report has been received from the local office as to the service of notice of the decision, and whether motion for review has been filed, within the time allowed, by the other party or parties entitled to file the same.

Notice of departmental decisions and orders should be promptly served by the local officers.

Secretary Bliss to the Commissioner of the General Land Office, August 23, 1898.

(W. V. D.) (W. A. E.)

With your office letter of July 26, 1898, was transmitted a motion for review, filed June 1, 1898, by John M. Couch of departmental decision of December 11, 1897 (25 L. D., 488), in the case of David C. Pryor

et al. v. John M. Couch, involving lots 1, 2, 3, 7, 8 and 9, fractional parts of the NE ¼ of Sec. 9, T. 11 N., R. 3 W., Oklahoma, Oklahoma land district.

It appears that Couch made homestead entry for said land April 25, 1889, and that several contests were filed against this entry, some of the contestants alleging merely the disqualification of the entryman and others alleging prior settlement in addition to the charge of disqualification. These contests were consolidated and a hearing was had at which all parties were allowed to submit testimony.

As a result of the hearing the local officers recommended the cancellation of the entry and awarded the preference right of entry to David C. Pryor, the first contestant.

On appeal your office held the entry for cancellation, but limited Pryor's preference right to lots 8 and 9, and awarded the preference right to the remainder of the land to contestant Joseph England.

On further appeal, the Department, by decision of December 11, 1897, *supra*, affirmed your office decision so far as it held Couch's entry for cancellation, but declined to consider any question as to the preference right of entry prior to application to exercise such right.

Motion for review of said decision, so far as it declined to pass upon his claim to lots 1, 2, 3 and 7, was filed by Joseph England, and on June 4, 1898 (27 L. D., 30), the Department modified its former decision and awarded to England the preference right of entry to said lots. Pryor's preference right was held to be absolute as to lots 8 and 9 and good as to the remaining lots against every one but England.

The specifications of error alleged in Couch's motion for review are, in substance, that the Department erred in holding that he was disqualified; and that it was error not to have suspended the contests of Joseph England and Hugh L. Ewing (both of whom alleged the disqualification of the entryman) until after hearing between the first contestant, David C. Pryor, the prior settlement claimants, and the entryman.

The general allegation that the Department erred in holding that Couch was disqualified, is not a proper ground for review, particularly as the ruling of the Department on this point was in accordance with the concurring decisions of your office and the local office.

The several contests in this case were consolidated as a matter of convenience. Pryor was the first contestant who alleged the disqualification of the entryman and (as was said in departmental decision of June 4, 1898) on the success of his contest the subsequent contests, so far as they contained the same charge, fell to the ground, Couch's entry was held for cancellation, then, on the first contest, that of Pryor, and his rights were in no way affected by the fact that England's and Ewing's contests were not suspended.

The motion for review is accordingly denied.

In this connection your office is instructed that hereafter when two

or more parties are each entitled to file motion for review of a departmental decision and one of them files such motion, this motion should not be transmitted to the Department for consideration until a report has been received from the local office showing proper service of notice of the decision of the Department and stating whether motion for review has been filed within the time allowed by the other party or parties entitled to file same. The course adopted in this case of transmitting the motions separately is one likely to lead to confusion and complications.

The local officers should also be advised of the necessity for prompt service of notice of departmental decisions and orders. The record shows that departmental decision of December 11, 1897, was promulgated by your office December 28, 1897, but notice thereof was not served on the parties in interest by the local officers until May 20, 1898, nearly five months later. No reason is assigned for this long delay. It thus happened that England, who was represented by Washington attorneys, filed his motion for review and the same was transmitted to the Department for consideration before Couch received notice of said decision.

CREDIT ENTRY — FORFEITURE — REINSTATEMENT — ACT OF MARCH 31, 1830.

McCLELLAN *v.* ENGLISH ET AL.

An entry made under the credit system, and forfeited for the non-payment of the full purchase price of the land, is by the terms of the act of March 31, 1830, reinstated, and should go to patent without further payment, where the amount of three dollars and a half per acre had been paid prior to the passage of said act; and an adverse entry made subsequent thereto will not defeat the right to such patent.

Where it appears that a tract of land has been duly bought and paid for according to law, and patent therefor has been withheld, through error of the government, for a long term of years, it is the duty of the Department on the discovery of such error to issue patent, irrespective of the manner in which such matter is brought to its attention.

Secretary Bliss to the Commissioner of the General Land Office, August 24, 1898.

(W. V. D.) (L. L. B.)

By your office letter of October 10, 1894, the register and receiver of the Huntsville, Alabama, land office were directed to allow Mary A. McClellan to make homestead entry of the NW. ¼ of Sec. 6, T. 4 S., R. 3 W. In pursuance of such authority she made entry therefor October 15, 1894.

From the said letter of your office it appears that—

Patrick English entered the tract in question under the credit system February 9, 1818, at the rate of $20.05 per acre, and paid $160 February 9, 1818, and $640.09 March 11, following.

There is no evidence that any steps were taken to complete the title to said land under any of the various relief laws, and under the act of March 21, 1828, U. S. Stat.,

Vol. 4, page 259, the land was forfeited July 4, 1829, and a note to that effect was entered upon the tract book. The said tract appears on the tract books of this office, so far as posted, as unappropriated public land.

The records of your office further show that the land had been entered under the homestead law on November 27, 1885, by John B. McClellan (said to be the father of Mary A. McClellan), which entry was canceled March 1, 1893, for failure to make proof within the statutory period.

Sometime previous to April 26, 1895 (the filing date not appearing on the application), the attorney for the American Freehold Land Mortgage Company, of London, England, filed an application to have the credit system pre emption entry of 1815 reinstated and carried to patent under and in virtue of the remedial acts of March 31, 1830, and February 25, 1831 (4 Stat., pages 390 and 445, respectively). As showing his right to make such application, he filed the affidavit of the American manager of said company to the effect that John B. McClellan while in the occupancy of said land, and while it was covered by his entry, had mortgaged it, together with certain other tracts of land, to said company, for a large amount of money—$22,500; that said mortgage had been foreclosed and the land purchased by the said company; and that the said McClellan had for a long time prior to the execution of said mortgage been in the open, notorious and undisputed possession of the said land and was so in possession at the date of the mortgage. In the application it is alleged that said John B. McClellan and his ancestors had for many years been claiming title thereto under the credit system entry of said Patrick English.

By your office letter of April 26, 1895, this application was denied, because of failure of the company to serve notice thereof upon Mary A. McClellan, whose entry thereon was of record. Thereupon the attorney for the company, on May 15, 1895, filed a second petition to the same effect, with due notice to Mary A. McClellan, and on June 10, 1896, she, through her attorney, moved to dismiss it upon the grounds that the company "fails to show that its mortgagee (mortgagor), John B. McClellan, derives title through mesne conveyance or otherwise from said Patrick English," and also that said company fails to show that the said Patrick English is entitled to relief under the said acts of March 31, 1830, and February 25, 1831.

In passing upon this second application, your office by its letter of August 27, 1896, overruled the motion of the entryman to dismiss the company's application, held that the tract was not subject to homestead entry and that under the acts of 1830 and 1831, above referred to, patent should issue on the entry of Patrick English, and directed that McClellan should be allowed thirty days in which to show why her entry should not be canceled for conflict with the credit system entry of Patrick English.

In response, counsel for McClellan submitted the following reasons

why her entry should not be canceled and why the entry of Patrick English should not be reinstated:

I. For non-payment of the purchase money the land was forfeited by Patrick English July 4, 1829, and said forfeiture was duly entered on the records of the General Land Office and so remains to this day.

II. That no action has ever been taken by English or any one claiming under him to perfect his entry, under the several relief acts passed since said forfeiture, and particularly, the act of March 31, 1830.

III. That the American Freehold Mortgage Company, who are now claiming the land, fail to show any connection with Patrick English, or his assigns, or any right to ask the reinstatement and patenting of said English's entry.

IV. The act of March 31, 1830, provides several modes of relief, the first of which is a pre-emption on the land until July 4, 1831, and the payment of a sum which together with what has been already paid shall not exceed $3.50 per acre. English having already paid a larger sum than that, to wit, $5.01 per acre, no further payment was required of him, but the law did require that he should make known his option, surrender his certificate of further credit and obtain his certificate of final entry and thus relieve his entry of the forfeiture standing against it within the time fixed by the statute.

By your office decision of December 21, 1896, these reasons were not considered sufficient, and the homestead entry of Mary A. McClellan was held for cancellation, and her appeal therefrom is now here for consideration.

This case depends upon the construction to be placed upon the act of March 31, 1830 (4 Stat., 390).

Prior to the passage of this act, and between the first day of March, 1809, and the ninth day of July, 1828, Congress had passed twenty-one separate acts, all for the relief of purchasers of public lands. It is not thought necessary to set out these acts in detail: it is sufficient to say that the general purport of them all was to hasten the extinguishment of the "debt due to the United States by the purchasers of the public lands," and in most of these acts the time for payment was extended, and in many easier terms, in the way of discounts for early payments, were made, they all finally culminating in the act above cited and in the supplementary act of February 25, 1831, hereafter noted.

The act first above referred to, so far as it relates to the present controversy, is as follows:

That all purchasers, their heirs or assignees, of such of the public lands of the United States as were sold on a credit, and on which a further credit has been taken, under any of the laws passed for the relief of purchasers of public lands, and which lands have reverted to the United States, on account of the balance due thereon not having been paid or discharged agreeably to said relief laws, such persons may avail themselves of any one of the three following provisions contained in this section, to wit: First—They shall have a right of pre-emption of the same land, until the fourth day of July, one thousand eight hundred and thirty-one, upon their paying into the proper office the sum per acre therefor, which shall, at the time of payment, be the minimum price per acre of the public lands of the United States, in addition to the amount heretofore paid thereon, and forfeited: *Provided*, That the price, including what has already been paid, and the amount to be paid, shall not, in any case, exceed three dollars and fifty cents per acre.

Under the proviso to this act it is plain that the highest price required to be paid for any lands theretofore sold under the credit system, and which had been forfeited for non-payment of the original contract price, was $3.50 per acre, and the purchasers in default were given until July 4, 1831, in which to make the payment. It would seem therefore that English, having already paid on the land in controversy more than $5.00 per acre, an amount in excess of that required by the statute, was at that time entitled to receive patent for his land.

This was the construction given to this act by a circular of the General Land Office of date April 15, 1830, addressed to the local land officers, construing this act of Congress, from which the following is quoted (Laws, Instructions and Opinions in Relation to the Public Lands, Part 2, page 424, No. 363):

GENERAL LAND OFFICE,
April 15, 1830.

GENTLEMEN: Annexed you have a copy of an act of Congress for the relief of purchasers of the public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States, approved the 31st ultimo.

By the 1st section of this act, the purchasers, their heirs or assignees, of the public lands upon which a further credit was taken, and which have reverted to the United States for failure in making complete payment therefor, have three different kinds of relief offered to them:

1st. They have a pre-emptive right to those lands until the 4th of July, 1831; and in all cases where the amount which has been actually paid in cash, and forfeited, on any tract of land, amounts to or exceeds $3.50 per acre, the claimant is entitled to receive a final certificate for such tract, without making any additional payment thereon.

The act of February 25, 1831 (4 Stat., 445), has no direct relation to lands of the quality (price) of the tract in controversy, that statute referring only to "such of the public lands as were sold on a credit system for a less price than fourteen dollars per acre;" but the two acts being *in pari materia*, the later act may be used to aid in construing the former.

Where there are earlier acts relating to the same subject matter, the survey must extend to them, for all are for the purposes of construction considered as forming one homogeneous and consistent body of law and each of them may explain and elucidate every other part of the common system to which it belongs. (Endlich on the Interpretation of Statutes, p. 54, sec. 43.)

The part of said act pertinent to the matter being considered is as follows:

That all purchasers, their heirs or assignees of such of the public lands as were sold on a credit for a less price than fourteen dollars per acre, and on which a further credit has been taken under any of the laws passed for the relief of purchasers of public lands, and which lands have reverted to the United States on account of the balance due thereon not having been paid or discharged, agreeably to said relief laws, shall be entitled to patents, without further payment, in all instances where one dollar and twenty-five cents, or a greater sum, per acre, shall have been paid.

It is thus seen that under this act title to lands that were originally sold for less than fourteen dollars per acre could be obtained by the payment (made or to be made) of $1.25 per acre, while under the act of

March 31, 1830, *any lands*, that is, lands sold at any price, were to pass to the purchaser on the payment, made or to be made, of $3.50 per acre.

Can it be doubted that the intention of Congress in both acts was, that upon the payment of the amounts therein named,—in the one $3.50 and in the other $1.25,—the purchasers, their heirs or assignees should "be entitled to patents without further payments?" If it had been doubtful from the language employed in the act of March 31, 1830, all doubt was removed by the act of February 25, 1831, by the use of the express words therein, "without further payment."

In a circular of instructions, of date March 9, 1831, issued by the Comsioner to the registers and receivers of the different land offices, explanatory of this later act, the following language is used:

> In *all* instances where the law directs that patents be issued without further payments, (the accounts having already been closed by the reversion of the land and the forfeiture of the amount paid,) it is only necessary that a remark be made on the face of the account, to the following effect, viz:
>
> "The act of the 25th of February, 1831, directs that a patent be issued without further payment."
>
> The register's final certificate, containing a transcript of the accounts, will of course exhibit the same remark. Final certificates should be issued in *all* such cases as soon as practicable. (Laws, Instructions and Opinions, Part 2, page 440, No. 372.)

These circulars considered in connection with that of May 27, 1831, quoted in the decision appealed from, exempting such lands from sale even though the holder of the credit certificate should not have surrendered the same to the register prior to July 4, 1831, leave no doubt as to the construction placed upon the act of March 31, 1830, *supra*, by the land Department, namely, that purchasers who had paid $3.50 per acre for their land were entitled to patent.

While it is true that the circular last referred to directs that

> final certificates are not to be issued thereon until such certificates of further credit . . . . shall have been filed in this office,

no time is fixed within which such filing shall be made, and it does not appear anywhere in the record that English or his assignees have ever been notified of this requirement of your office. Moreover, in this circular the register was directed to report to your office all such cases in which the certificates of credit had not been surrendered, and in pursuance of this instruction the register reported the tract in question in his returns for August, 1831, as one of the tracts "*entitled* to *patent*" under the provisions of the act of the 31st March, 1830, and of the supplementary act of the 25th February, 1831.

At the time this sale was made (1818) and these laws were passed and circulars promulgated, the disposal of the public lands was made with a view only to the revenue to be derived therefrom. No consideration of residence, improvements and cultivation, requiring proof *aliunde* the record, as were later required, entered into the laws regulating the sale of the public domain. A price was fixed and conditions for the payment of the same were made and changed to suit the

convenience of the purchaser or the demands of the revenue, and the payment of this price so fixed was the one consideration that entitled the purchaser to patent.

The record in this case not only shows that the requisite price was paid by English, but it further shows that the government was fully cognizant of the fact that it had been paid, and the notation of the forfeiture of the tract upon the tract book, for failure to pay prior to the 4th of July, 1829, was, in effect abrogated by the provisions of the said act of March 31, 1830, and the requirement of the government had been fully complied with. It follows that the government has not been the owner of the land in controversy since the passage of the act of March 31, 1830, and that English or his heirs or assignees have, ever since that date, been entitled to patent therefor, and would possibly long since have received it only for the failure to remove the notation of forfeiture upon the tract book.

The objection of counsel for McClellan, that because the plaintiff has not shown title from English through mesne conveyance, its petition can not be entertained, can not be allowed to prevent this Department from issuing patent to the parties shown to be entitled to it. It is true that the plaintiff does not show title derived from English, and can not under the evidence now before the Department claim as an assignee of his title, but this fact does not interfere with the duty of the Department in the premises. Through the application of plaintiff, attention has been brought to the fact that patent to a quarter-section of land bought and paid for according to the terms of the law, has been withheld from its rightful possessor for more than sixty years after the right to patent accrued, through the error of an agent of the government. It is further shown by the record that the homestead claimant has no equities that should prevent this Department from issuing patent to this land.

You will direct the issue of patent for the land described to "Patrick English, his heirs or assigns," leaving to the courts the determination as to who are the lawful heirs or assigns of the said purchaser.

The decision appealed from is affirmed.

HOMESTEAD—ADDITIONAL ENTRY—SECTION 6, ACT OF MARCH 2, 1889.

ULRICH *v.* RANK.

A homestead entry for one hundred and sixty acres, made in good faith by one who has theretofore perfected title under a homestead entry for eighty acres, may stand intact as to the eighty acres on which the improvements are situated, where it appears that the entryman is entitled to take that amount as an additional entry under section 6, act of March 2, 1889.

Secretary Bliss to the Commissioner of the General Land Office, August 25, 1898.
(W. V. D.) (C. J. W.)

May 7, 1894, Charles L. Rank made homestead entry for the NE. ¼ of Sec. 2, T. 26 N., R. 6 W., I. M., Enid, Oklahoma.

December 11, 1894, Louis H. Ulrich filed affidavit of contest against said entry, alleging the disqualification of defendant, because he had made entry and received patent for eighty acres in Kansas.

The parties filed an agreed statement of facts.

It appears that defendant made homestead entry for the N. ½ of the NE. ¼, Sec. 22, T. 22, R. 17 W., at Larned, Kansas, in 1877, and made final proof and received patent therefor in 1880; that on May 7, 1894, he purchased the relinquishment of a party who had made entry of the tract now in dispute, which he filed and made entry himself, believing and having been informed that he was qualified to make the entry; that he has made valuable improvements upon the east half of the tract. The local officers recommended that defendant's entry be canceled as to the W. ½ and remain intact as to the E. ½, and that Ulrich have a preference right to make entry for said W. ½. Plaintiff appealed, and on December 9, 1895, your office affirmed the local office and held the W. ½ of said homestead entry for cancellation and the E. ½ intact.

The case is before the Department on the further appeal of plaintiff from your office decision. It is insisted that defendant when he filed his homestead affidavit, wherein it is stated that he had not heretofore made entry of any land under the homestead laws, committed such fraud as vitiates his whole entry.

Section 6 of the act of March 2, 1889 (25 Stat., 854), provides:

> That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres.

It appears, therefore, that the entry theretofore made by defendant in the State of Kansas was no bar to his making an additional entry for eighty acres more. The first entry is admitted, but with the qualification that at the time the last entry was made the defendant was informed and believed that he had the right to make entry for the one hundred and sixty acres in the Cherokee strip. That he so believed, and had been so informed, is a part of the agreed state of facts. It follows that the contention that he acted fraudulently in making the last entry is inconsistent with said agreed facts.

Your office decision is accordingly affirmed.

MOORE *v.* PARKER.

Motion for review of departmental decision of July 15, 1898, 27 L. D., 196, denied by Secretary Bliss, August 26, 1898.

RAILROAD GRANT—INDEMNITY SELECTION—ADJOINING FARM.

JOHNSON *v.* NORTHERN PACIFIC R. R. CO.

Prior to adjoining farm entry residence on the original farm, with cultivation of the adjacent tract, is not residence on said tract, and does not constitute a claim that will exclude it from indemnity selection.

Secretary Bliss to the Commissioner of the General Land Office, August 26, 1898.

(W. V. D.) (G. R. O.)

This case comes before the Department on the appeal of Andreas Johnson from your office decision of October 14, 1896, rejecting his application to make adjoining farm entry of the NE¼ of the SE¼ of Sec. 15, T. 136 N., R. 44 W., St. Cloud, Minnesota.

It appears from the record that this land is within the indemnity limits of the grant to the Northern Pacific Railroad Company, and was selected by said company on June 16, 1885. On April 26, 1892, rearranged list No. 9 D. was filed by the company, designating the lost lands, tract for tract, as a basis for such selection.

In the spring of 1895, Andreas Johnson applied to make adjoining farm entry of the land. A hearing was had upon this application on April 6, 1895, and upon the testimony submitted the local officers held that Johnson's application should be allowed. On appeal by the railroad company your office reversed this decision, holding that—

A claimant residing upon an original farm cannot claim a preferred right to make adjoining farm entry of an adjoining tract by virtue of cultivation and improvement of such tract prior to his application to enter the same; for the reason that residence upon the original farm is not residence upon the adjoining tract until the entry has been made. (13 L. D., 713).

The testimony shows that Johnson has lived on one hundred and twenty acres of land adjoining the land in controversy since 1870; that he has been cultivating the land in dispute in connection with the other land, since 1879, but has never established a residence upon it. The law applicable to cases of this kind is correctly stated in your office decision, quoted above.

Johnson had not, therefore, at the date of the company's selection of the land, such a right to it as would defeat the company's right of selection, and his application was properly rejected.

Your decision is affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—ADDITIONAL ENTRY.

LUND *v.* NORTHERN PACIFIC R. R. CO.

The right of an applicant to make an additional homestead entry, under the act of March 3, 1879, of land subject thereto, is not defeated by a subsequent indemnity selection on behalf of the Northern Pacific.

Secretary Bliss to the Commissioner of the General Land Office, August 26, 1898.

(W. V. D.) (G. R. O.)

The facts in this case as shown by the record, are as follows:

The N. ½ of the NE. ¼ of Sec. 17, T. 135 N., R. 43 W., in the St. Cloud,

Minnesota, land district, was within the limits of the withdrawal made for the benefit of the Northern Pacific Railroad Company upon the filing of its map of general route on August 13, 1870.

On June 30, 1871, Einar Lund applied to make homestead entry of this tract, together with eighty acres in section 8 adjoining it. His application was rejected as to the land now in controversy, for the reason that it was an odd section reserved for the Northern Pacific Railroad Company, and for the further reason that the land in section 8 being double-minimum land, he was only entitled to enter eighty acres. He then made homestead entry of the eighty acres in section 8, and received patent therefor November 20, 1877.

Upon definite location of the Northern Pacific railroad on November 21, 1871, the land was found to be within the thirty mile indemnity limits of said road.

On November 10, 1883, Lund applied to enter the tract under the act of March 3, 1879 (20 Stat., 472), as additional to his homestead entry above mentioned. At that time the land was claimed by the St. Paul, Minneapolis and Manitoba Railway Company (St. Vincent extension) under its grant.

On June 16, 1885, the Northern Pacific Railroad Company applied to select the tract as indemnity.

A hearing was ordered to determine the rights of the respective claimants to the tract, and the case coming on appeal to this Department, a decision was rendered on April 24, 1891, in which it was said:

> As between the two railroad companies the case at bar is controlled by the decision above cited [St. Paul and Pacific R. R Co. *v.* Northern Pacific R. R. Co., 139 U. S., 1], and it was therefore error to hold that the Northern Pacific Railroad Company had no right to select said tract, for the reason that it was in conflict with the grant to the St. Paul, Minneapolis and Manitoba Railway Company.
>
> If the selection of the Northern Pacific Railroad Company is in all other respects valid, it will be approved and the application of Lund will be rejected. (See St. Paul, Minneapolis & Manitoba Ry. Co. *et al. v.* Lund, 12 L. D., 398.)

On February 18, 1895, Lund again applied to make additional homestead entry of the land. On this application a hearing was ordered to determine the rights of Lund as against the Northern Pacific Railroad Company. On the testimony submitted the local officers found that Lund had made final homestead entry for eighty acres of land adjoining this, and had continued to reside upon said eighty acres ever since he had made application therefor, and had continued to improve the land in controversy in connection therewith, ever since 1871, and that his improvements on this land are worth $300. They recommended that his application to enter the land be allowed and that the claim of the railroad company thereto be rejected. The railroad company appealed to your office, which, on October 14, 1896, reversed the decision of the local officers and rejected his application, holding that Lund's claim to the land had been adjudicated by the decision of this Department above referred to (St. Paul, Minneapolis and Manitoba Railway Co. *et al. v.* Lund). Lund now appeals to this Department.

The first question to be discussed here is whether said decision of April 24, 1891, determined the rights of Lund to the land, so as to preclude any further adjudication of the case by this Department.

Said decision was not intended as an adjudication of Lund's right to the land. It merely held that the right of the Northern Pacific Railroad Company was superior to that of the St. Paul, Minneapolis and Manitoba Railway Company, and said that the selection of the Northern Pacific Company, *if in all other respects valid*, would be approved, and the application of Lund rejected. The said selection was not "in all other respects valid," for Lund's application made on November 10, 1883, was a bar to such selection made by the company on June 16, 1885. That the Department did not intend to adjudicate Lund's claim to the land by said decision is shown by its ruling on the same day in the case of Northern Pacific Railroad Company *et al. v.* Ambers (12 L. D., 395). The facts on which that case was decided were precisely similar to those in the case at bar, and it was held therein that Ambers' right to make an additional homestead entry of the land was superior to the right of selection by the railroad company.

The decision of April 24, 1891, in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Lund, will not, therefore, stand in the way of an adjudication of Lund's right to make entry of the land, and that question will be decided on its merits.

It appears that Lund has resided upon the eighty acres of land included in his original entry since 1871, and has cultivated and improved the land in dispute in connection therewith during all of this time. At the date of his original entry he could have entered only eighty acres of land, but the act of March 3, 1879 (28 Stat., 472), gave him the right to make an additional entry of eighty acres. He applied to make such entry on November 10, 1883.

The land not being subject to the grant to the St. Paul, Minneapolis and Manitoba Railway Company, and the Northern Pacific Railroad Company not having applied to select the land as indemnity until June 16, 1885, at the date of Lund's application it was subject to entry by any legal applicant and his application should have been allowed. The selection of the railroad company for this tract will be rejected and Lund will be allowed to make entry of the same.

Your decision is reversed.

MINING CLAIM—PROOF OF CITIZENSHIP—EXPENDITURE.

CLARK'S POCKET QUARTZ MINE.

Proof of citizenship on the part of a corporation is made by filing a certified copy of its articles of incorporation; such certificate being made under seal of the officer having custody of the records where said articles are recorded.

Mining work done on one claim for the benefit of that and other adjoining claims may be credited to the adjoining claims as well as to the claim on which the work is actually done, but the fact that such work has been done, and its relation to the claim for which patent is asked, must be fully shown.

Secretary Bliss to the Commissioner of the General Land Office, August 26, 1898.

(W. V. D.) (P. J. C.)

March 26, 1896, the Gold Hill Mining Company, a corporation claiming to have been incorporated under the laws of the State of Illinois, made application for patent for the Clark's Pocket Quartz Mine, survey No. 3320, Stockton, California, land district, and entry No. 473 was made November 7, 1896.

There was filed with the application an abstract brought down to February 14, 1896; a copy of the articles of incorporation of the company, certified to by a notary public of Cook county, Illinois, in which he says he has compared the copy with the original and that the copy is correct. The return of the deputy mineral surveyor who made the survey is as follows:

There are no improvements upon this claim. The Gold Hill Mining Company have expended large sums in improving the adjoining claim, and their works are so constructed as to serve to work the ore from this vein. They contemplate increasing the capacity of their mill.

There is a large amount of matter on these claims that is easy to work and will pay a profit when worked in large quantities, and by improved processes. The company say that they have been advised that they can count their works as improvements upon the claim for the reason that they will be used for the working of the claim and really no improvements are needed on the claim but simply to go to work extracting the milling matter and transporting it to the mill.

They intend putting up another mill to increase the capacity for reduction.

Their grades, tramways, tunnels and excavations have cost many thousand dollars. Their hoisting works are of the value of at least three thousand dollars and their mill not less than ten thousand dollars.

The affidavit of the witnesses as to improvements states:

The amount expended on said mining claim in labor and improvements by the said claimants or their grantor is not less than twenty-five thousand dollars. Said improvements consist of mining tunnels, sinking shafts, running cuts and building mills, etc. This claim adjoins the property upon which the improvements have been made, but is in the consolidation and a part of the company's claim entire.

The surveyor general does not make any report as to improvements.

By letter of January 28, 1897, your office required (1) a supplemental abstract from February 14, 1896 to and including March 26, 1896, the date of the application for patent; (2) a certificate of the surveyor

general as to the statutory expenditure, and (3) "evidence that the articles of incorporation of said company have been filed in the office of the Secretary of the State of California."

In answer to this the mineral applicant filed the original location certificate, which he calls a supplemental abstract, under said first requirement, and appealed from the other demands of your said office decision.

Sec. 2321 (R. S.) provides that—

> Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

Rule 68 (25 L. D., 582), of the Mining Circular contains substantially the same language. In the case of a corporation, that which is required is a certified copy of the charter or certificate of incorporation. The supreme court of California in South Yuba, etc. *v.* Rosa (80 Cal., 333) has held that "there is no provision or authority in the statute by which foreign corporations are to file a copy of their articles of incorporation with the Secretary of State of this State." The action of your office therefore in requiring "evidence that the articles of incorporation of said company have been filed in the office of the Secretary of the State of California" was erroneous. The copy of its charter filed by the company does meet the requirement of the statute. The certificate should be made by the officer who has the custody of the original, or who has control of the records where the same is recorded, and should be under the seal of his office. The certificate of a notary public that he has compared a copy with the original articles of incorporation is not sufficient.

The contention that your office should not have demanded the certificate of the surveyor-general as to the expenditure of $500 in labor or improvements is not sound. Even if this claim is one of a group belonging to the applicant, the fact is that this is an independent application for a patent which does not include any other claim. Mining work done on one claim for the benefit of that and other adjoining claims constituting a group with a common ownership may be credited to the adjoining claims as well as to the claim on which the work is actually done, but the fact that such work has been done and its relation to the claim sought to be patented must be fully shown.

The judgment of your office is affirmed. Since, however, there are no adverse claims to the ground so far as appears by the record, your office is directed to give the mineral claimant a reasonable time within which to comply with the requirements of your office as herein modified. The supplemental abstract not having been passed upon by your office, is returned for consideration.

INDIAN LANDS—TIMBER CUTTING

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
August 26, 1898.

Logging Regulations to govern logging by Indians on the ceded Chippewa Reservations, Minnesota, under the provisions of the act of Congress approved June 7, 1897 (Public No. 3).

1st. The Indians on the ceded Chippewa Reservations, Minnesota, shall be authorized to enter into a contract or contracts with any responsible person or persons to cut and bank any specified quantity of dead timber standing or fallen on said reservations, at a given price per thousand feet, such responsible person or persons being required to give bond in a sufficient penalty, stipulating for the faithful performance of the obligations of such contract, the careful observance of the intercourse laws, etc.

2nd. There shall be designated from the corps of Chippewa examiners, appointed under the act of January 14, 1889 (25 Stat., 642), for the effectual carrying out of these regulations, a superintendent and as many assistant superintendents as the Commissioner of the General Land Office may select. The superintendent designated for the purpose of directing logging operations, shall, with the assistance of the Indian agent at White Earth agency, require each Indian desiring to cut and bank saw logs, to make a selection of the dead timber standing or fallen, and thereafter make application to be allowed to contract for the cutting and banking of such timber, describing by section, township and range the land on which the dead timber is standing or fallen.

As the dead and down timber is logged from each subdivision of land on which it may be found, said designated examiners shall make the examination thereof under the direction of the chief examiner and the regulations governing them, for the purpose of ascertaining on which of said lots or tracts there is standing or growing pine timber, and shall make their minutes, notes and reports as heretofore.

3rd. Before any timber shall be cut under the foregoing authority, a contract shall be entered into between the Indian applicant or applicants and some responsible person or persons as provided in paragraph one, and in such form as shall be prescribed by the Commissioner of the General Land Office, which contract, however, shall not be of force until the same is approved by the Indian agent and superintendent, and confirmed by the Commissioner of the General Land Office, which approval and confirmation shall operate as a permit for the cutting and banking of the timber applied for by the Indian or Indians.

4th. It shall be the duty of the superintendent and assistant superintendents to go into the woods with the loggers, and direct their labors, to the end that no green or growing timber may be cut, and

* Amendment of regulations issued September 28, 1897, 26 L. D., 81.

that no live trees may be damaged in any manner, so as to cause them to die, and also to inspect the scaling of the logs.

5th. The superintendent shall receive, in addition to his compensation as examiner of Chippewa lands, one dollar and fifty cents per day for such time as his services may be actually necessary in logging operations hereunder, and his actual and necessary traveling expenses, and the assistant superintendents shall receive, in addition to their salaries as examiners of Chippewa lands, their actual and necessary traveling expenses; and such additional compensation and traveling expenses shall be paid from the proceeds of the sale of logs. Such additional compensation and expenses are in consideration of the added duties of said persons. The assistant superintendents shall oversee and direct such portions of the work as the superintendent may direct.

6th. With the exception of the superintendent, assistant superintendents and scaler, and in cases where persons of sufficient knowledge and skill for foremen, blacksmiths, filers, teamsters, clerks and cooks cannot be found among the Indians, no white labor shall be employed in performing this work, until all available Indian labor shall have been employed.

7th. One-half of the cost of scaling shall be paid by the Indian loggers, and one-half by the purchaser of the logs. After the scaling is completed, the sale of the logs shall not be valid until the same is approved by the Indian agent and superintendent and confirmed by the Commissioner of the General Land Office.

8th. The Indian agent will assume control of the proceeds of the sale, of which two dollars per thousand feet for white pine and one dollar per thousand feet for Norway shall be deducted by him for the benefit of the Indians, and to pay all expenses of the sale, such as advertising, telegraphing, additional compensation of superintendent and traveling expenses of superintendent and assistant superintendents, provided that, in any case where the logs are sold for an amount exceeding six dollars per thousand feet for white pine and five dollars per thousand feet for Norway, the amount to be deducted for the benefit of the Indians, as above stated, shall be proportionately increased in the discretion of the Commissioner of the General Land Office.

The net proceeds remaining shall be divided and paid as follows:

1st. He shall pay, from the sales of the logs under each contract, the party or parties furnishing the advances under the contract, authorized in section 9, to the logger who delivered said logs.

2nd. He shall pay the scaler or scalers of such logs, the amount due on the part of the Indian logger.

3rd. He shall pay the foreman, blacksmiths, teamsters, filers, clerks, and cooks of the logger any balance that may be due them under their contracts with the logger.

4th. He shall pay the laborers of the logger any unpaid balance which may be due them under their contract for labor performed in the cutting or delivery or banking of such logs.

5th. He shall pay the logger or contractor who banked such logs, any part remaining of the amount to be paid under his contract.

9th. Any logging Indian, on a proper showing of his inability to furnish his logging outfit, or to sustain himself or his family, during the logging operations, may receive advances of goods or cash from any party with whom he may contract, which contract shall first be approved by the Indian agent to such limit as the Indian agent may fix, and such advances shall be paid by the Indian agent to the party making the same from the amount to which such Indian is entitled for his logging work.

10th. The Commissioner of the General Land Office shall have power to prescribe such rules and regulations not inconsistent with these regulations as he may deem proper from time to time, for the more efficient prosecution of the logging operations, and to thoroughly protect the interests of the Indians and the Government in the premises.

F. W. MONDELL,
Acting Commissioner.

Approved,
C. N. BLISS,
Secretary.

ALASKAN LANDS—ACT OF MAY 14, 1898.

JOHN G. BRADY.

The provision in section 10, act of May 14, 1898, for the protection of rights initiated under the act of March 3, 1891, works no enlargement of said rights as to the area of land that may be taken, or the water front thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *August 30, 1898.* (E. B., Jr.)

In the case of John G. Brady the Department, on March 4, 1898 (26 L. D., 305), held that Brady was entitled, under the provisions of sections twelve and thirteen of the act of March 3, 1891 (26 Stat., 1095), to purchase a tract of land of about fifty acres, being part of the land embraced in survey No. 6½ in the District of Alaska, instead of the entire tract of one hundred and sixty acres embraced in said survey and claimed and entered by him on May 2, 1894, as cash entry No. 10. The decision of the Department directed that claimant be required to have his survey and entry amended and to make payment for the land in accordance with the views therein, or, in default thereof within a reasonable time after notice, that his entry be canceled.

Under date March 17, 1898, the resident attorney of the claimant, and the local office, were notified of the action of the Department, and such office was also directed to notify the claimant. Personal notice, it appears, was given claimant by the local office on July 8, 1898. Under

date July 15, 1898, your office called upon the local office for report and directed that office to—

> give notice to claimant that he is allowed sixty days within which to amend his survey and entry and make payment for the land, as required by said decision, and in default of compliance therewith his entry, hereby held for cancellation, will be canceled, without further notice from this office.

No response has been made by claimant except as hereinafter mentioned.

On May 14, 1898, an act of Congress was approved (Public No. 95), entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," section ten of which makes provision for the acquisition of title to public lands in said District "for the purposes of trade, manufacture, or other productive industry." The fourth proviso to the section reads:

> That all claims substantially square in form and lawfully initiated, prior to January twenty-first eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said act, but subject to the requirements and provisions of this act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods.

On May 25, 1898, claimant filed here his unsworn petition invoking the Secretary in the exercise of his supervisory authority—

> to allow the petitioner to make further proof in full compliance with the requirements of sections twelve and thirteen of the act approved March 3rd, 1891 (26 Stats., Chapter 561), as modified by Sec. 10 of the act approved May 14, 1898, to the end that the petitioner may perfect, fully pay for and have patented to him his entire claim of 160 acres which was lawfully initiated prior to January 1, 1898, by survey and by use and actual occupation and possession for some years in good faith.

No showing whatever is made by claimant in support of said petition.

It would seem to be the purpose of the above proviso, both as expressed on its face in connection with the other provisions of the section and as viewed in the light of a careful examination of the discussion thereof by Congress while the measure was there pending (Congressional Record Fifty-Fifth Congress, Second Session, pp. 2657, 4946, 5082 and 5083), to provide for the protection and perfecting of rights acquired under the prior law before the date named, but not to enlarge those rights. Section ten, which is in the nature of a substitute for sections twelve and thirteen of the prior law, imposes, instead, new and narrower limitations upon the exercise of the right to purchase in cases initiated after January 21, 1898, leaving, however, by virtue of said proviso, rights under the older law unimpaired as to area of the land claimed, but limited as to water frontage to one hundred and sixty rods. The area, and, in effect, the extent of water front, to which claimant is entitled, have been determined by the Department upon the proofs submitted by the claimant. No showing or allegation of

error is made by him such as would justify the Department in reopening his case. It is not apparent that the said section ten makes any provision by virtue of which the rights of claimant as to area or water front may be enlarged. The present claim, as before stated, was initiated under sections 12 and 13 of the act of March 3, 1891, and can only "be perfected and patented upon compliance with the provisions of said act," and is in that respect unlike a claim initiated under the act of May 14, 1898. Claimant's petition is accordingly denied.

Upon consideration of the premises, however, the period within which claimant may comply with the requirements of the decision of March 4, 1898, is hereby extended sixty days from notice hereof, to be given him by the local office in the usual manner.

HAND *v.* DE REMER.

Motion for review and rehearing denied by Acting Secretary Ryan, August 30, 1898. See departmental decision of May 23, 1898, 26 L. D., 676.

RAILROAD GRANT—INDEMNITY SELECTION—ACT OF JULY 1, 1898.

SHOL *v.* NORTHERN PACIFIC R. R. CO.

Residence upon, and improvement of land by an alien, prior to his declaration of intention to become a citizen, will not defeat the right of the company to make indemnity selection of land so occupied.

The settler in such case may, under the act of July 1, 1898, take other land in lieu of his settlement claim, and if he declines to exercise such privilege the company should then be invited to relinquish such tract and select other land in lieu thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 30, 1898.* (G. R. O.)

Your office, under date of October 14, 1896, rejected the application of Christian A. Shol to make homestead entry of lots 6 and 7 and the S½ of the SW¼ of Sec. 35, T. 134 N., R. 42 W., St. Cloud, Minnesota, land district.

The land in question is within the indemnity limits of the grant to the Northern Pacific Railroad Company and was selected by said company on June 16, 1885. In February, 1895, Shol applied to enter the land. A hearing was ordered on his application and on the testimony submitted the local officers held that Shol was not a qualified homesteader at the date of the company's selection, and recommended the cancellation of his entry. On appeal your office affirmed this decision. The case has now been appealed to the Department.

The testimony shows that Shol settled on the land in 1883 with his

family and has continued to reside there ever since, and that he has made valuable improvements on said land. He was not born in the United States, however, and did not declare his intention of becoming a citizen of this country until July 1, 1886. He was not qualified, therefore, to assert a claim under the settlement laws until that time, and his settlement upon and occupancy of the tract on June 16, 1885, did not defeat the right of the company to make indemnity selection thereof. See Herron *v.* Northern Pacific R. R. Co. (14 L. D., 664).

The decision of your office, holding that the settlement of Shol was no bar to the company's right of selection of June 16, 1885, was, therefore, correct, and is hereby affirmed.

The facts of this case bring it within the act of July 1, 1898 (30 Stat., 620), and you will therefore notify Christian A. Shol, the claimant against said railroad company, of his right to transfer his claim to other lands in lieu thereof as therein provided; and in the event he declines this option the railroad company will, under the provisions of said act, be duly invited to relinquish the land herein claimed and to select other lands in lieu thereof.

MINING CLAIM—ADVERSE—MINING REGULATIONS.

McFADDEN ET AL. *v.* MOUNTAIN VIEW MINING AND MILLING CO.
(ON REVIEW.)

A protest filed as the basis of adverse proceedings which clearly and definitely notifies the mineral applicant of the nature, boundaries, and extent of the alleged adverse right, meets the requirement of the statute as to the showing required in the local office on the part of an adverse claimant, and should be accepted for such purpose, even though it may not meet all the requirements of the mining regulations.

The departmental decision herein of April 16, 1898, 26 L. D., 530, recalled and vacated.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 30, 1898.* (E. B., Jr.)

This case comes again before the Department under an order dated June 15, 1898, entertaining a motion by McFadden and others for review of the decision of April 16, 1898 (26 L. D., 530), therein. That decision, affirming the decision of your office, holds insufficient, for the purposes of an adverse claim, the papers filed as such by McFadden *et al.* against the application of the Mountain View Mining and Milling Company for patent to the Mountain View lode claim, survey No. 351, Spokane Falls, Washington, land district.

After setting out the facts and the provisions of the statute (section 2326 Revised Statutes) and the official regulations (paragraphs 83 and 84 of regulations under the United States mining laws, approved December 10, 1891) applicable to the case, the decision under review

holds the papers filed as an adverse claim to be defective in three particulars:

1. Title was not evidenced in the manner prescribed by said paragraph 83.

2. The plat of the adverse claims was not made by a United States deputy surveyor as required by said paragraph 84, but by a private surveyor.

3. There was no showing as to the value and ownership of labor and improvements upon the claim as required by the latter paragraph.

The contentions of the motion, briefly stated, are that the papers filed as an adverse claim meet all the requirements of the *statute*, and that the requirements of the official regulations upon which the said decision is predicated are not warranted by the statute and are therefore void.

For a full statement of the facts reference is hereby made to the decision in question. It is specifically conceded in the decision that:

> Judged by the language of the statute alone and disregarding the foregoing regulations, they (the papers) would "show the nature, boundaries and extent" of the adverse claim.

In the case of Anchor *et al. v.* Howe *et al.* (50 Fed. Rep., 366), which was a suit in the circuit court of the United States for the district of Idaho, in support of an adverse claim, Beatty, district judge, speaking for the court, said:

> It is alleged by the bill that this action is instituted in pursuance of the provisions of section 2326, Rev. St., and that "complainants made their protest and adverse claim under oath and in due form of law, and filed the same in the United States land office," etc. The defendants plead, in abatement of the action, that no adverse claim was filed or allowed in such land office. It sufficiently appears that an adverse claim in due form was presented to the land office for filing, but was rejected because it did not appear therefrom that a survey of the disputed premises, and a map thereof, had been made by a deputy United States surveyor. Said section 2326 requires that the adverse claim filed "shall show the nature, boundaries, and extent" thereof. This statute is in all particulars complied with by the adverse claim presented to land office, and no question is or can be raised that the statute itself is not fully observed. But by the forty-ninth rule, issued by the Commissioner of the General Land Office, approved by the Secretary of the Interior, the plat showing the boundaries of the conflicting premises "must be made from an actual survey by a deputy United States surveyor." Must this rule be regarded as a part of the law, and be closely followed? is the only question for determination. The plat and certificate attached comply with the rule, except that it does not appear that the surveyor who made them and the survey was a United States surveyor. In support of the effect of this rule, the department decisions found in Sickles, Min. Dec., 263, 265, 277, are cited. In those cases it appears the adverse claims were very irregular, and wholly failed to comply with said rule in not showing that any survey had been made, and in omitting the certificates required. Their conclusion is not based alone upon the fact that the surveyor was not a United States deputy, but, on the contrary, it is stated in one that "no surveyor," and in another that "no United States deputy or other surveyor," had performed the required acts. It may fairly be inferred from these cases that the performance of such acts by any surveyor would be sufficient. Weeks on Mineral Lands, 190, says they may be performed by

a United States deputy or other surveyor. But admitting that such rule can be complied with only by procuring the services of a United States surveyor, the question still remains whether the rule itself has the force of positive law; and by what authority can the land department make it. It is clearly invested by the statute with the executive duties in the disposal of the public lands; and by section 2478 "the commissioner of the general land office . . . . is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions" applicable to the disposal of the public lands. Under this section the validity of all departmental regulations which are appropriate, and within the limitations of the law, cannot be doubted. This, however, is not a grant of power to legislate; to add to the law; to render its enforcement difficult; to burden the proceedings under it with unnecessary expense or hardship; or to encumber them with onerous and technical conditions. It is designed that the permitted regulations shall simplify and explain, not embarrass, the administration of the law; and certainly they must not only be appropriate, but they must be reasonable, and within the limitations and intent of the statute. By the requirement that the boundaries and extent of the conflict shall be shown, it was not designed that the representation thereof made in the land office should be final, in that office or elsewhere; for that question is remitted to the courts for decision, and they are not in any way dependent upon the adverse claim as filed, but base their action upon a full development of all the facts. The most apparent, if not the only, object of this statute is that the applicant for patent may have a definite notice of what is claimed against him, which he may then concede or contest. Any adverse claim, apparently made in good faith, and which clearly and definitely notifies the applicant for patent of the conflict between his and the adverse mining claim, would seem to meet and comply with the object of the statute, and certainly would be sufficient to so put in issue the question of contest that the interest of all parties could be protected by the courts. It is suggested that the government does not design that its mineral lands shall be patented upon a survey made by any surveyors except those especially appointed by it. No patent, however, is issued upon such unofficial survey, or, at least, not until after an investigation by the court, where any error can be detected and corrected, and neither the government nor others can be injured thereby. I am unwilling to say that this and all the department regulations, regardless of their encroachment upon or variation from the law, and the needless expense, inconvenience, and hardship which they may entail beyond those which would result by following only the provisions of the law itself, shall be literally and technically construed and enforced. Such a rule would not be conducive to the ends of justice. When they must be followed, and when they may be disregarded, may not be easy to define by any general rule; but in all cases they must be appropriate, and within the limitations of the statute in the enforcement of which they are designed to aid, and which they cannot supplant. It has frequently been held by the supreme and other United States courts that regulations in conflict with the law are invalid; those which enlarge its requirements, though not in exact conflict with or contradiction of it, should be likewise regarded. If this rule is not clearly within the former, it is within the latter class. The defendants' plea, therefore, is disallowed.

Although in that case the question was only as to the sufficiency, as part of the adverse claim, of a plat made by a private surveyor, the rule announced applies to an adverse claim as a whole. And so it was said by the court that:

> Any adverse claim, apparently made in good faith, and which clearly and definitely notifies the applicant for patent of the conflict between his and the adverse mining claim, would seem to meet and comply with the object of the statute, and certainly would be sufficient to so put in issue the question of contest that the interest of all parties could be protected by the courts.

In harmony with these views of the court the Department in the recent case of the Hallett and Hamburg Lodes (27 L. D., 104), considering the statute and the official regulations relative to notice of application for patent to a mining claim, said (p. 108):

> It is believed to be the intent of the statute (and with this intent the regulations thereunder must be in harmony) that the notice of application for patent, both posted and published, should contain such matter as will inform a man of ordinary intelligence and prudence having an interest in a mining location conflicting with the one applied for, that application is made for patent to the ground in conflict, thereby giving him an opportunity to file and prosecute an adverse claim and thus assert and protect his rights as provided by section 2326 Revised Statutes. If, in any case, a notice contains such information, it is sufficient whether it conforms with every minute requirement of the official regulations or not. Such regulations are prepared and issued as a guide to applicants and the local officers, and are generally in matters of detail, directory rather than mandatory.

These views, as announced by the court and declared by the Department, applied to the case at bar lead to a different conclusion as to the sufficiency of said papers from that reached in the decision under review. Having in effect decided, heretofore, as already pointed out, that those papers meet the requirements of the *statute*, which requirements, rather than those of the said regulations, it is now decided must control, it is not deemed necessary to discuss and pass upon the papers as to each of the three particulars in which they failed to answer the requirements of the said regulations.

The decision of April 16, 1896, is hereby recalled and vacated, the decision of your office reversed, and the papers in question are accepted as a sufficient adverse claim in accordance with the foregoing.

RAILROAD GRANT—SETTLEMENT RIGHTS—INDEMNITY.

NORTHERN PACIFIC R. R. CO. *v.* BLAIN ET AL.

The ruling of the supreme court in the case of Northern Pacific R. R. Co. *v.* Colburn, 164 U. S., 383, does not preclude the recognition of settlement rights as against subsequent intervening indemnity selections, for that case dealt with lands in the primary limits, where rights attach at definite location, while in the indemnity limits of the Northern Pacific no right exists in the company prior to the selection of indemnity, and the approval thereof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 31, 1898.* (P. J. C.)

On August 9, 1893, the plat of survey of township 28 N., R. 8 E., Seattle, Washington, land district, was filed in the local office, and part of said township, as shown by the map of definite location of the branch line of the Northern Pacific Railroad Company, filed September 3, 1884, lies within the indemnity limits of the grant to said company under the act of Congress approved July 2, 1864. On said August 9, the railroad company applied to select as indemnity certain tracts of land in said

township, described in its application list No. 52, aggregating 5674.39 acres.

Subsequently to the filing of this application a number of parties tendered homestead and pre-emption applications for said tracts, in each homestead application settlement being alleged prior to the company's application to select, and in the pre-emption applications settlement was alleged prior to the repeal of the pre-emption law, March 3, 1891.

The local office suspended the homestead and preemption applications, and on August 18, 1893, rejected the company's application to select for conflict with the same; and upon the company's appeal, your office, on May 31, 1895, held that the rejection of the company's application was erroneous and that upon the allegations of prior settlement of the individual applicants hearings to determine the facts should have been ordered, as prescribed by circular of September 6, 1887 (6 L. D., 131).

Hearings were accordingly had before the local officers, who treated the cases as one case, referring, however to each individual settler and making a finding in regard to each. The same form of procedure was followed in your office and will also be followed by the Department in the consideration of the several cases.

The record has been examined in all these cases, and in the following the action of your office in affirming the recommendations of the local officers that the claim of the railroad company be rejected is concurred in:

* * * * * * *

[Title of case, and description of land in nineteen cases thus disposed of, omitted.]

Your office also affirmed the action of the local office in the case of John H. Kintcel, in holding that he was entitled under his pre-emption declaratory statement, dated November 9, 1893, to the E. ½ of the NW. ¼ and the E. ½ of the SE. ¼ of Sec. 17, alleging settlement July 20, 1890. The judgment of your office in regard to this case is objected to by the railroad company for the reason, as stated, that said declaratory statement was not filed within three months after the filing of the plat of survey—it being stated by counsel that it was not filed until November 13, 1893. All the papers accompanying the pre-emption declaratory statement are dated November 9, 1893, which was within the three months allowed for filing. It is stated in the opinion of the local officers that it was filed on that day. The only authority counsel has for stating that it was filed on November 13, 1893, is a pencil memorandum of that date upon the back of the application. It is not shown, however, that this was the day of the filing. The action of your office in this matter is also affirmed.

Francis J. Havens made homestead application for the E. ½ of the NE. ¼ of Sec. 29, alleging settlement May 10, 1892. Your office affirmed the action of the local officers in awarding him the land. I am not able to

concur in your office judgment. Havens in his examination does not state whether he was a married man or not; he says that he made settlement on the land May 15, 1892, and that it has continued to be his residence; that he has resided there continuously. On cross-examination of his witness Putman, it is shown that Havens has a family, which was residing at the date of the hearing in Sultan; that Havens "moved his family away into Sultan in the fall of 1892." It will thus be seen that his family was upon the land but a short time, when they moved away and have not since resided thereon. Your office judgment in this case is reversed.

It is contended by counsel that under the decision of the supreme court in the case of Northern Pacific *v.* Colburn (164 U. S., 383) the rights of the several applicants could not attach so as to defeat the claim of the company until there had been an entry of record in the local office, and the selection of the company being prior in point of time, that it should prevail.

I do not think this position tenable. The Colburn case deals with lands within the granted limits, the right of the railroad company to which attached on the filing of the map of definite location. The lands in controversy are within the indemnity limits and no right in the company existed until a selection had been made in lieu of lands lost in place and the same approved.

As modified, the judgment of your office is affirmed.

REPAYMENT—RELINQUISHMENT—ENTRY ERRONEOUSLY ALLOWED.

AARON EIBESHUTZ.

The right to repayment does not exist where an entry is voluntarily relinquished and canceled for such reason only.

A desert entry of land subject thereto under the terms of the desert land law is not "erroneously allowed" within the meaning of the repayment statute, though the land, on account of its proximity to a military reservation, may have been excluded from settlement and location under the act of March 3, 1853, extending the preemption law to the State of California.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 1, 1898.* (C. J. G.)

The record in this case shows that on July 25, 1881, Aaron W. Eibeshutz made desert land entry No. 123 for the W ½ of lot No. 1 of NW¼ Sec. No. 5, lot No. 1 of NE¼, E½ of lot No. 1 of NW¼ and E½ of SW¼ Sec. No. 6, T. 13 S., R. 35 E., Bodie, now Independence, land district, California.

February 14, 1884, he relinquished said entry, the language of his relinquishment being, in part, as follows:

I do hereby abandon and relinquish all claim to the same, and I request that my said application No. 123 may be canceled on the records and files of your office. I make this abandonment for the following reason: That my business relations and circumstances are such that I am unable to reclaim and make final proof upon the same.

Upon this relinquishment, and solely as the result thereof, Eibeshutz's entry was canceled.

January 26, 1897, Eibeshutz made application for repayment of his purchase money, which, under date of February 24, 1897, was denied by your office, on the ground of failure of the records to "show that this entry was erroneously allowed and cannot be confirmed or that it was canceled for conflict." Reconsideration of this decision was asked, which was denied by your office April 27, 1897, for the reason that under Rule of Practice No. 77 the thirty days within which parties are allowed to file motions for review had expired.

Eibeshutz has now appealed from your office decisions to this Department.

The basis of this application for repayment is that the land in question is within one mile of the Camp Independence military reservation, in California, and for that reason, under section 7 of the act of March 3, 1853 (10 Stat., 244), said land was not subject to entry. That portion of said section 7, material in this connection, is as follows:

> And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority.

It is therefore contended that under the act named Eibeshutz's entry was erroneously allowed and could not be confirmed, and for that reason he is entitled, under the repayment statute, to a return of his purchase money.

In the first place it will be observed, as previously set out herein, that Eibeshutz's entry was canceled solely on the ground of his voluntary relinquishment. In the second place he allowed nearly thirteen years from the date of his relinquishment to elapse before applying for repayment, and this is of slight significance as indicating or showing that he did not consider that he had any meritorious claim for repayment. In the third place, by reference to the desert land act of March 3, 1877 (19 Stat., 377), it will be seen that there is nothing in the language thereof forbidding, either directly or indirectly, the entry of desert lands within one mile of a military post or reservation. Reference must be made to this act to ascertain what lands are subject to desert land entry; consequently the act of March 3, 1853, *supra*, is really not applicable to the case.

For these reasons your office correctly held that there is nothing in the record to show that the entry in question was "erroneously allowed" within the terms of the repayment statute.

It is unnecessary to consider the other matters raised by the appeal.

Your office decision is hereby affirmed.

SETTLEMENT CLAIM—UNSURVEYED LAND.

WOODLAND *v.* STOW.

An act of settlement on unsurveyed land must be of such a character, and so open and notorious, as to be notice to the public generally of the extent of the claim.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 1, 1898.* (C. W. P.)

The case of William W. Woodland *v.* Daniel S. Stow, upon the latter's appeal from your office decision of December 16, 1896, has been considered.

The land involved is the SE. ¼ of the SE. ¼ of section 7, the SW. ¼ of the SW. ¼ of section 8, and the NE. ¼ of the NE. ¼ of section 18, township 10 south, range 37 east, Blackfoot land district, Idaho.

The record shows that on June 26, 1889, Woodland made desert land entry, No. 968, of an unsurveyed tract of land in town and range aforesaid; that the land was surveyed and became subject to entry on June 3, 1895, on which day Stow made homestead entry, No. 4617, of the SE. ¼ of the SE. ¼ of section 7, the SW. ¼ of the SW. ¼ of section 8, and the N. ½ of the NE. ¼ of section 18, in said township and range. On the same day Woodland filed a corroborated affidavit, stating that on June 26, 1889, he made desert land entry, No. 968, on certain unsurveyed land, in what was then Bingham county, and upon which final proof was submitted and accepted by the United States land office at Blackfoot, and that the land upon which he made final proof, and which was irrigated and reclaimed under and by virtue of his said desert land entry, is the SE. ¼ of the SE. ¼ of section 7, the E. ½ of the NE. ¼, the NE. ¼ of the SE. ¼ of section 18, the NW. ¼ of section 17, and the S. ½ of the SW. ¼ of section 8, in township 10 south, range 37 east, B. M.

This adjustment was rejected by the local officers for conflict with Stow's entry. Woodland appealed. Your office on November 4, 1895, ordered a hearing "to determine the rights of Woodland and Stow."

On January 16, 1896, a hearing was held. Before the hearing it was stipulated between the parties

that the testimony as taken in short hand and transcribed by the stenographer in the above entitled case shall stand as testimony without the signatures of the several witnesses. It is also stipulated that the testimony be confined to the period prior to and at the date of the entry of William W. Woodland, the contestant, to wit: June 26, 1889.

From the evidence adduced the local officers found in favor of Woodland, and recommended that Stow's entry of the SE. ¼ of the SE. ¼ of Sec. 7, the SW. ¼ of the SW. ¼ of Sec. 8, and the NE. ¼ of the NE. ¼ of Sec. 18, be canceled.

Stow appealed. Your office sustained the decision of the local officers and held for cancellation Stow's entry of the lands in conflict with Woodland's entry, leaving Stow's entry intact as to the NW. ¼ of the NE. ¼ of Sec. 18.

In your office decision it is stated:

I find from the testimony that Stow is a blacksmith and stone mason. About twelve years ago he built a house and began his residence upon the land covered by his entry, but not upon any one of the legal subdivisions in controversy. In March, 1889, he stuck four stakes for the purpose of marking the four corners of his claim, which at that time comprised a tract about eighty rods wide and about one mile long. How long the stakes remained is not shown. Woodland knew nothing about these stakes when he made his entry. Stow never cultivated or fenced any portion of his claim. All of his improvements, consisting of three houses, valued at $600, are located upon the legal subdivision that his house is on and not on the land in controversy. Stow says he made said improvements with the intention of homesteading one hundred and sixty acres. That the land was desert in character, and has been reclaimed, has been duly alleged by the plaintiff and is not disputed. The peculiar shape of the tract Stow says he staked off (Staples *v.* Richardson, 16 L. D., 248), and the unsurveyed condition of the land require that the acts of settlement must be of such a character and so open and notorious as to give notice to the public generally of the extent of the claim. McWeeney *v.* Greene, 9 L. D., 38. This is not shown by Stow to have been the case.

These findings of facts are fully authorized by the evidence, and your conclusion is concurred in.

The evidence does not show that, when Woodland made his desert land entry, there were any marks on the land in dispute, indicating that Stow's claim included it, or any part of it, nor had Woodland otherwise notice that Stow's settlement covered the land in question.

An act of settlement on unsurveyed land must be of such a character and so open and notorious, as to be notice to the public generally of the extent of the claim. McWeeney *v.* Greene, 9 L. D., 38; Little *v.* Durant, 3 L. D., 74.

As to the land in conflict Woodland has the better right, and your office decision is affirmed.

Rules and Regulations, under the Act of July 1, 1898, authorizing the sale of timber on the portion of the Colville Indian Reservation, vacated by the Act of July 1, 1892 (27 Stat., 62).

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 11, 1898.

By virtue of the power vested in the Secretary of the Interior by the act of July 1, 1898 (Public, No. 175), the following rules and regulations are hereby prescribed:

1. The terms of the act do not grant to settlers, miners, or others, the free use of timber from the lands therein designated for mining or other purposes.

2. The right is granted to cut timber for mining and domestic purposes at such price, and subject to such regulations as may be prescribed by the Secretary of the Interior from that part of the Colville Indian

Reservation in the State of Washington, which was vacated and restored to the public domain by the act of July 1, 1892 (27 Stat., 62).

3. The sale of timber is optional, and the Secretary may exercise his discretion at all times as to the necessity or desirability of any sale.

4. While sales of timber may be directed by this Department without previous request from private individuals, petitions from responsible persons for the sale of timber in particular localities will be considered. Such petitions must describe the land upon which the timber stands by legal subdivisions if surveyed; if unsurveyed, as definitely as possible by natural land marks; the character of the country, whether rough, steep, or mountainous, agricultural or mineral, or valuable chiefly for its forest growth; and state whether or not the removal of the timber would injuriously affect the public interests. If any of the timber is dead, estimate the quantity in feet, board measure, with the value, and state whether killed by fire or other cause. Of the live timber, state the different kinds and estimate the quantity of each kind in trees, per acre. Estimate the average diameter of each kind of timber, and estimate the number of trees of each kind, per acre, above the average diameter. State the number of trees of each kind above the average diameter it is desired to have offered for sale, with an estimate of the number of feet, board measure, therein, and an estimate of the value of the timber as it stands. These petitions must be filed in the proper local land office, for transmission to the Commissioner of the General Land Office.

5. Before any sale is authorized, the timber will be examined and appraised, and other questions involved duly investigated by an official designated for the purpose; and upon his report action will be based.

6. When a sale is ordered, notice thereof will be given by publication by the Commissioner of the General Land Office; and if the timber to be sold stands in more than one county, published notice will be given in each of the counties, in addition to the required general publication.

7. Within thirty days after notice to a bidder of an award of timber to him, payment must be made in full to the receiver for the timber so awarded; or equal payments therefor may be made in thirty, sixty and ninety days from date of such notice, at the option of the purchaser. The purchaser must have in hand the receipt of the Receiver for each payment before he will be allowed to cut, remove, or otherwise dispose of the timber covered by that payment. The timber must all be cut and removed within one year from the date of the notice by the Receiver of the award; failing to so do, the purchaser will forfeit his right to the timber left standing or unremoved and to his purchase money: *Provided*, that the limit of one year herein named may be extended by the Commissioner of the General Land Office, in his discretion, upon good and sufficient reasons being shown.

8. Thirty days' notice must be given by the purchaser to the Commissioner of the General Land Office, of the proposed date of cutting and removal of the timber, so that an official may be designated to

supervise such cutting and removal. Upon application of purchasers, permits to erect temporary sawmills for the purpose of cutting or manufacturing timber purchased under this act may be granted by the Commissioner of the General Land Office, if not incompatible with public interests. Instructions as to disposition of tops, brush, and refuse, to be given through the special agent in each case, must be strictly complied with, as a condition of said cutting and manufacture.

9. No timber taken from the said public lands and sold as above prescribed may be exported from the State of Washington.

10. Receivers of public moneys will issue receipts in duplicate for moneys received in payment for timber, one of which will be given the purchaser and the other will be transmitted to the Commissioner of the General Land Office in a special letter, reference being made to the letter from the Commissioner authorizing the sale, by date and initial, and with title of case as therein named. Receivers will deposit to the credit of the United States all such moneys received, specifying that the same are on account of sales of public timber on the north half of the Colville Indian Reservation, State of Washington, under the act of July 1, 1898. A separate monthly account-current (form 4–105), and quarterly condensed account (form 4–104), will be made to the Commissioner of the General Land Office, with a statement in relation to the receipts under the act as above specified.

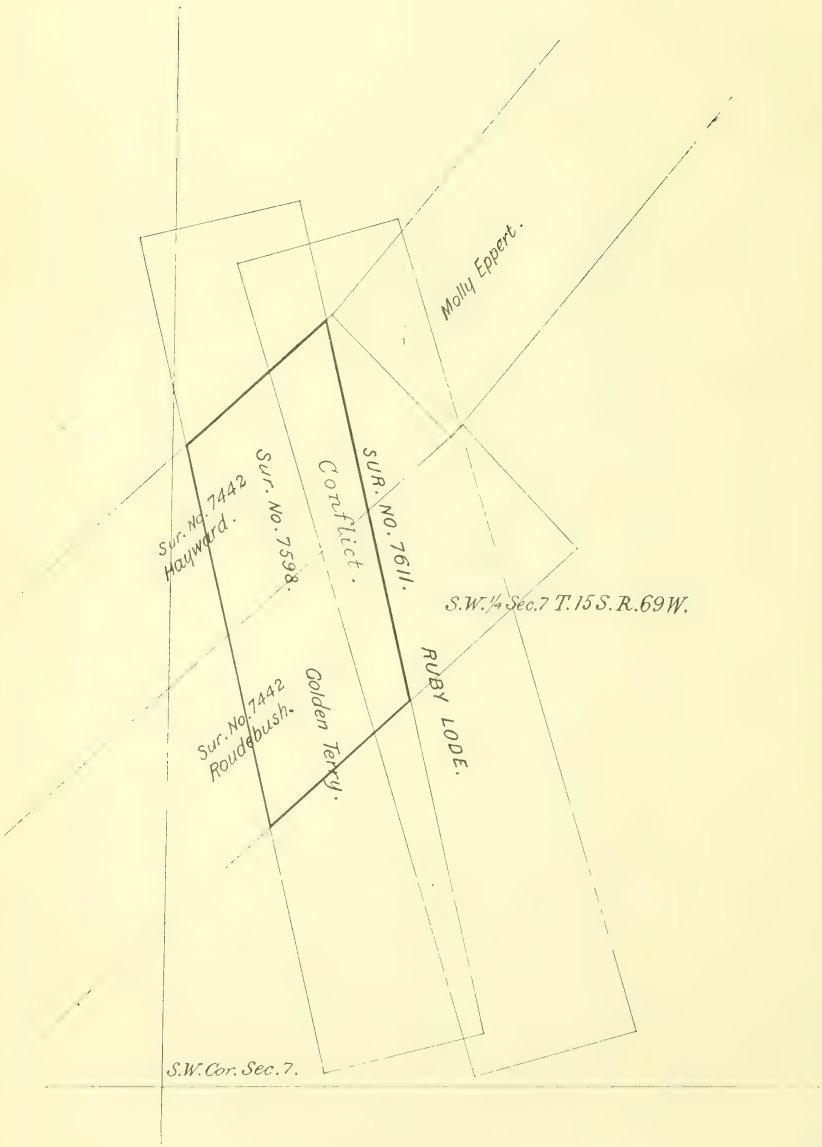
11. Special instructions will be issued for the guidance of officials designated to examine and appraise timber, to supervise its cutting and removal, and for carrying out other requirements connected therewith.

12. The Secretary of the Interior reserves the right to prescribe such further restrictions as he may, at any time, deem necessary, or to revoke the privileges granted, in any cases wherein he has information that persons are abusing the same, or when it is necessary for the public good.

13. A homestead settler, Indian allottee, or miner, who is holding and occupying his settlement, allotment, or mining location, in full compliance with the law governing such claim, is allowed to cut therefrom such timber as is required to clear the ground for *prompt* and *bona fide* cultivation, and for building, fencing, and making other improvements upon his claim; and he may exchange it for lumber to be applied to those purposes; but he can not lawfully *sell* the timber for money, or exchange it for supplies, provisions, or use it to pay debts, etc., except so far as it may have been cut for the purpose of speedily cultivating, or mining more conveniently, the ground from which it was severed.

BINGER HERMANN,
Commissioner.

Approved, August 11, 1898:
C. N. BLISS,
Secretary.


Molly Eppert.
Sur. No. 7442
Hayward.
Sur. No. 7598.
Conflict.
SUR. NO. 7611.
S.W.¼ Sec. 7 T. 15 S. R. 69 W.
RUBY LODE.
Sur. No. 7442
Roudebush.
Golden Terry.
S.W. Cor. Sec. 7.

HALLETT AND HAMBURG LODES.

Motion for review of departmental decision of June 25, 1898, 27 L. D., 104, denied by Acting Secretary Ryan, September 2, 1898.

ROBERTSON *v.* PHILLIPS.*

Motion for review of departmental decision of June 15, 1898, 27 L. D., 74, denied by Acting Secretary Ryan September 2, 1898.

MINING CLAIM—RELINQUISHMENT—ADVERSE—NOTICE.

SHIELDS ET AL. *v.* SIMINGTON.

Where a mineral applicant during the period of publication, and prior to the filing of any adverse claim, relinquishes part of the land covered by his location, such relinquishment runs to the United States, though in terms made for the benefit of another claimant, and operates to withdraw from the pending application the land so relinquished, and no rights can thereafter be secured as to the land so withdrawn by adverse proceedings against said application.

In case of a relinquishment of part of the land covered by a mineral application, pending publication, the better practice requires the register to withdraw and correct the notice, and commence anew the publication thereof; but failure so to do can not affect the force and validity of the relinquishment, or impair the notice, for, as to the land relinquished the notice is mere surplusage, being limited to the application as amended by the relinquishment.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 2, 1898.* (E. B., Jr.)

This is an appeal by J. M. Shields and others, claimants of the Golden Terry lode claim, from the decision of your office, dated August 5, 1896, dismissing their protest against the application of John Simington, trustee for himself and others, for patent to the Ruby lode claim, survey No. 7611, Pueblo, Colorado, land district. Said decision affirms the decision of the local office dated June 5, 1896.

The plat of the survey of the Ruby claim shows conflicts between that claim and the Golden Terry, Hayward, and Roudebush lode claims. The conflicts between those claims, respectively, are shown on the accompanying diagram.

It will be observed that the Golden Terry, survey No. 7598 also conflicts with the Hayward and Roudebush claims, both of which are embraced in survey No. 7442, and that the Ruby and Golden Terry not only cross the Hayward and Roudebush, but they also overlap

* In the disposition of this motion the Acting Secretary states that it was not intended in the original decision to hold that Phillips was by his presence in the Territory disqualified to enter any land therein, only that he was disqualified thereby from entering the tract in controversy.

each other in crossing, so that there is a strip of ground within the lines of survey No. 7442 which is embraced in common, also, within the overlapping lines of surveys Nos. 7598 and 7611.

September 17, 1892, The Comstock Eldridge Gold Mining Company filed application for patent to the Hayward, Roudebush and certain other lode claims, embracing therein the conflict between the two last named claims and the Golden Terry and Ruby claims. Publication of notice thereof was commenced September 23, following, and continued unchanged for the statutory period of sixty days. September 28, 1892, there was filed an instrument duly executed September 20, 1892, by the president and secretary of the said company, relinquishing, disclaiming and surrendering, "in favor of the conflicting Ruby lode claim," all right, title, and interest in and to those portions of the Hayward and Roudebush locations, respectively, which were embraced within the Ruby location, and excluding such portions from the company's application. November 21, 1892, within the period of publication, James M. Shields, Olive E. Enfield and Owen Prentiss, as owners of the Golden Terry location, filed an adverse claim against the company's application as to the Hayward and Roudebush locations; and in a suit in support thereof under section 2326, Revised Statutes, they obtained judgment January 13, 1893, against the company awarding to them all the ground in conflict. No adverse claim against the company's application was filed by the Ruby claimants.

April 24, 1893, John Simington, trustee as aforesaid, filed application for patent to the said Ruby claim including the ground relinquished and surrendered by the said company, and also all the other conflict between the Ruby and the Golden Terry claims. June 26, 1893, during the period of publication said Shields, Enfield and Prentiss, as owners of the Golden Terry location, filed their adverse claim against the Ruby application, and duly commenced suit in support thereof, but, April 27, 1894, the same was on their motion dismissed. In the meantime, February 13, 1894, they had filed their application for patent to the Golden Terry claim, but, as declared therein, "expressly excepting and excluding from their application the ground in controversy with the Ruby lode pending litigation." In the published notice of their application, which commenced February 19, 1894, they repeat in substance the language of the application as to such exception and exclusion. November 8, 1894, the said company made entry under its application, excluding all the ground relinquished, surrendered, and awarded by the said judgment.

January 25, 1895, the said Shields and others, applicants for the Golden Terry claim, filed their protest against the allowance of an entry by the Ruby claimants as to—

All that ground in common between the Ruby and Golden Terry lode claims which is also embraced within the Hayward and Roudebush lode claims, as shown by the plat of Ruby lode claim, survey No. 7611.

The protest briefly alleges the filing of the Golden Terry adverse against the said company's application, the said judgment in protestants' favor as to the ground described in the protest, and that the Ruby claimants did not adverse the company's application; and contends that therefore the protestants and not the Ruby claimants are entitled to enter the said ground. This is also the contention of protestants' appeal.

The question at issue therefore is whether the said judgment in favor of the Golden Terry adverse claimants and against The Comstock Eldridge Gold Mining Company, applicant for the Hayward and Roudebush claims, is conclusive and binding upon the Ruby claimants as to the title to the ground in controversy. If the said judgment is conclusive of the rights of all these claimants as to such ground, then the Golden Terry claimants are entitled to enter the same notwithstanding the relinquishment and exclusion by the said company, the prior application, as between the Ruby and Golden Terry claimants, for the said ground, and the dismissal of the adverse suit of the last named claimants.

The effect to be given to said judgment must depend upon the effect given to the said relinquishment and exclusion. If the instrument filed September 28, 1892, was in effect a withdrawal of the land described therein from the company's application, the said judgment as to any such land was no bar to an application therefor by the Ruby claimants and is impotent to prevent entry thereof by them. If the land was not so withdrawn, being then covered both by the application and in the published notice, the said judgment is conclusive not only upon the company, but upon the Ruby claimants and all the world. As to land so duly included the published notice is by the statute made process which brings all the world into court and any party claiming adversely to the applicant must duly present his claim or be forever barred.

The said instrument was executed three days prior to the commencement of the published notice, was filed five days subsequent thereto, and had been on file nearly two months when the Golden Terry adverse was filed. A claim to public mineral land is a claim against the United States. The Comstock-Eldridge Company's relinquishment, whether so expressed on its face or not, ran to the United States, even though declared therein to be made in favor of the Ruby claimants, and when filed absolutely relieved the land it covered from the claim of the company. Having been filed before any adverse claim was filed the relinquishment operated to withdraw from the pending application the land relinquished, and this it accomplished as effectually as if that land had never been included in the application. The land in controversy being eliminated from the application, the company could not receive patent thereunder for it, and there was hence no need for the Ruby claimants to file an adverse claim in order to protect their location. To have filed such claim would have been to do a vain thing. It would have been properly rejected by the local office.

The published notice as already stated continued, as begun, unchanged throughout the period of publication. It would have been better practice for the register to have withdrawn and corrected such notice, and commenced anew the publication thereof, to accord with the change effected by the relinquishment, but the failure to do so could not affect the force and validity of the relinquishment; nor did it impair the notice. The notice still covered all the land claimed by the company and its sufficiency was therefore unaffected. As to the land relinquished, and excluded from the application, the notice was mere surplusage, its extent was necessarily limited to the application as amended, in effect, by the said instrument. It was no more sufficient as a basis for adverse proceedings, as to such land, than would be a notice which erroneously covered any other mineral land not claimed by the applicant for patent.

The Golden Terry applicants allege that they had no knowledge of the said instrument until about July 1, 1896. Conceding that they were without actual knowledge thereof, it remains that the instrument was part of the record in the Hayward-Roudebush application, and had been on file with the papers therein nearly two months, before the Golden Terry claimants filed their adverse claim. If they neglected to inform themselves in the premises, and, choosing to rely upon the published notice instead of ascertaining the facts as disclosed by the papers in the local office, included in their adverse claim ground not embraced in the application, and, subsequently, depending, as they allege, upon their said judgment, dismissed their adverse suit against the Ruby applicants, they must suffer the consequences of their negligence and miscalculation.

Inasmuch as the ground in controversy was not embraced in the Hayward-Roudebush application as amended by said instrument, the Golden Terry adverse was without force or effect as to such ground. It might properly have been rejected as to that ground, just as an adverse claim by the Ruby claimants, had one been filed, would, as already stated, have been likewise rejected. A relinquishment or exclusion which would excuse the Ruby claimants from filing an adverse claim would equally excuse any other party claiming adversely as to the land embraced therein, or any part thereof. A relinquishment which protects one party who claims adversely to the applicant protects every other such party from all harm to his interests by reason of the proceedings for patent. Otherwise the relinquishment or exclusion would often be a delusion and a snare—a device to entrap the unwary. One party could not repose in safety under it if another could elect to disregard it and proceed under section 2326 Revised Statutes to secure judgment in his favor which would not only bind the immediate parties but be conclusive upon all other claimants of the excluded ground.

That section contemplates and authorizes proceedings only as to

ground embraced in an application for patent. In the present case the ground in controversy having been duly excluded from the application prior to the filing of the Golden Terry or any other adverse, it was not subject to proceedings under said section 2326. It follows that the said judgment, as to that ground, is not a judgment under that section, and hence not conclusive upon the Ruby claimants. No patent thereunder could properly issue for that ground. The rights of the Ruby claimants are not affected by the said judgment.

What has just been said disposes of the suggestion that the adverse claim filed by Shields and others against the company's application made it the duty of the Ruby claimants to intervene in the suit in support of the adverse claim, in order to protect any interest they claimed in the land in conflict. No such action was required for the reason that the land they claimed had been excluded from the application and not being the subject of proceedings for patent, no rights thereto could either be acquired or lost under section 2326 Revised Statutes.

The decision of your office is affirmed in accordance with the foregoing.

HAMRE ET AL. *v.* CUNNINGHAM ET AL.

Motion for rehearing denied by Acting Secretary Ryan September 8, 1898. See departmental decision of May 16, 1898, 26 L. D., 665.

MILL SITE—NOTICE OF APPLICATION FOR PATENT.

PEACOCK MILL SITE.

An application for entry and patent, that embraces a lode claim and millsite, can not be allowed as to the millsite, if copies of the plat and notice of application are not posted thereon.

The case of New York Lode and Mill Site, 5 L. D., 513, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office.

(W. V. D.) *September 8, 1898.* (P. J. C.)

It seems that the Red Rock Copper Company made application for patent and entry for the Uphill and other lode claims and the Peacock millsite, survey 1208 A. and B., Tucson, Arizona, land district. It appears that the notice of application was posted on one of the mining claims, but no notice or plat was posted on the millsite.

By letter of March 24, 1897, your office required claimant within 60 days

to commence republication of the notice of application for patent for the millsite, said republication to be accompanied by posting upon the millsite claim and reposting in the local office.

From this order the company has appealed and for various reasons set forth asks that your office decision be reversed, and the entry referred to the Board of Equitable Adjudication.

The plea of counsel that the applicant was furnished but one copy of the plat by the surveyor-general and instructed by him "to post one plat upon said claim," and that the company was not advised or notified that posting was necessary on the millsite, is not considered as a sufficient reason or excuse for its failure to do so. The Department prepares instructions as to the procedure to obtain patents. These are for free distribution and available to all persons. It is upon the departmental instructions that parties must rely and not what some individual may tell them.

Section 2337 R. S., provides for the patenting of millsites, and that they

> may be embraced and included in an application for a patent for such vein or lode and the same be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes.

Paragraph 66 of the mining circular of December 10, 1891 (paragraph 65 of the circular of December 15, 1897, 25 L. D., 582), provides that—

> A copy of the plat and notice of application for patent must be conspicuously posted upon the millsite as well as upon the vein or lode for the statutory period of sixty days.

The necessity for this requirement can be readily understood when it is considered that it is only "non-mineral land not contiguous to the vein or lode" that can be taken as a millsite. The latter may be and not unfrequently is located at a considerable distance from the mining claim; and that proper notice might be given to any one who might claim adverse rights to the millsite, both the statute and the rules provide for posting the notice of application and the plat thereon. It is not seen how this requirement can be avoided and there be a compliance with the law.

It is true that in the New York Lode and Millsite claim (5 L. D., 513), where the facts were substantially the same as those at bar, the entry was approved and sent to the Board of Equitable Adjudication for confirmation. The Department, however, is not disposed to follow the doctrine announced in that case. In the judgment of the Department, good administration demands that no entries be referred to said board where it appears, as in the present case, that there has been a plain and undeniable violation of the law relative thereto. It is only such entries as are made informally, where the "error or informality arose from ignorance, accident, or mistake," and where the law has been substantially complied with, that should be referred to the board. It can not be said that in the case at bar there has been a substantial compliance with the law.

The fact that no adverse claim to a millsite has been asserted before the Department ought not to be considered evidence that there is no

adverse claim in a case where the very objection raised is that the applicant has not given such notice as would reach adverse claimants or require them to make their claims known; but, be this as it may, there has not been such a compliance with the law in making entry of the millsite that it can be passed to patent in its present condition, or referred to the Board of Equitable Adjudication for confirmation.

It is inferred from the appeal that the appellant construes your office order to mean that there must be a re-publication and re-posting for all the claims included in the application. The Department does not so understand the order of your office. All that is required is the republication of the application for the millsite, alone, and the posting of the plat and notice on the millsite and in the local office.

Your judgment is accordingly affirmed. The doctrine of the case of the New York Lode and Millsite (5 L. D., 513), will not be followed.

TUBBS *v.* NORTHERN PACIFIC R. R. CO.

Motion for review of departmental decision of June 20, 1898, 27 L. D., 86, denied by Acting Secretary Ryan, September 8, 1898.

MINING CLAIM—ADVERSE—APPLICATION—EXCLUSION.

WOODS *v.* HOLDEN ET AL. (ON REVIEW).

It is not necessary for one who has prosecuted an adverse claim to a favorable judgment to make an original application for patent for the ground included in such judgment, for under section 2326 R. S., said ground can be patented on a copy of the judgment roll.

An applicant for mineral patent who excludes or omits from his application ground, the right to the possession of which has been regularly and judicially determined in his favor, and for which he can obtain patent without embracing it in such application, does not by such exclusion or omission invalidate or waive any claim or right which he would otherwise have.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 12, 1898.* (P. J. C.)

The parties to this controversy have filed separate motions for review of departmental decision of February 14, 1898, (26 L. D., 198), involving the Mary Mabel lode mining claim, mineral entry No. 595, Pueblo, Colorado, land district.

Subject to a correction hereinafter mentioned, reference is had to the former decision for a statement of the case. It was there held that the entry by the Mary Mabel of the conflict with the Sierra Nevada would have to be canceled because two separate judgments in adverse proceedings against the Hartford had been given in favor of the Mary Mabel and Sierra Nevada respectively for the same portion of the

Hartford, and no determination had been had of the conflict between these two judgments.

It is insisted by the Mary Mabel owners that the statements and allegations made by the Sierra Nevada owners in a suit for specific performance against the Mary Mabel owners, pending in a local court, show that the Sierra Nevada owners have waived their rights as adverse claimants under section 2326, Revised Statutes, and are now relying upon an agreement with the Mary Mabel owners to obtain title to the conflict between the two claims. This contention was made before the former decision was rendered but was not sustained.

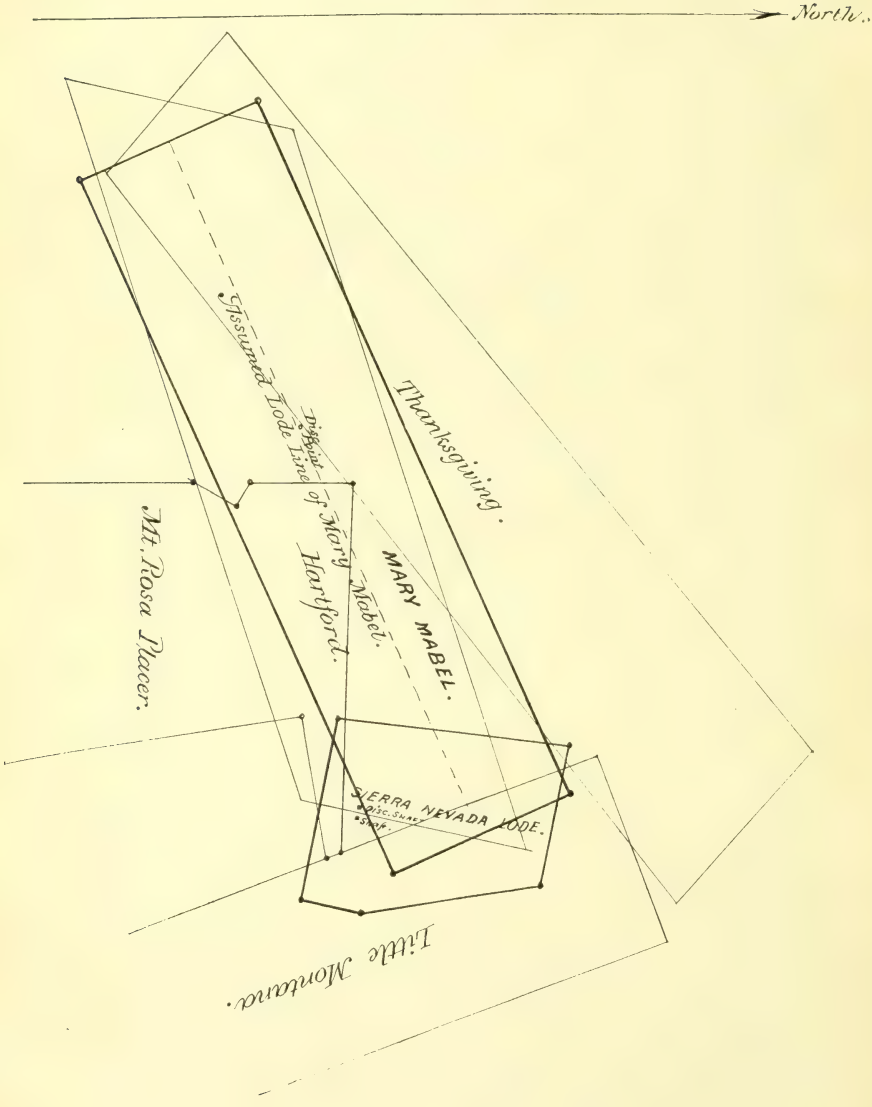
It appears that the said statements and allegations of the Sierra Nevada owners in the specific performance suit are in that suit denied by the Mary Mabel owners, and that the issue thus made has not been tried or determined. Obviously, the Mary Mabel owners can not consistently ask the Department to hold the Sierra Nevada owners to statements and allegations the truth of which is put in issue and contested by the Mary Mabel owners in the very proceeding where the statements and allegations are made.

The question here is whether the Mary Mabel owners have shown themselves entitled to a patent for all of the ground embraced in their entry, and the Department is of opinion that they have not shown themselves entitled to the ground which is common to the judgments of the Mary Mabel and Sierra Nevada respectively obtained against the Hartford. The Department is confronted by the fact, as shown in the former decision, that two separate judgments of equal force and for the same ground have been rendered by the same local court in favor of opposing claimants, neither judgment making any reference to the other. The Department adheres to what was said in the former decision upon this point, viz:

> Where adverses involving a common conflict are filed and prosecuted, that fact is necessarily shown by the records of the local office and the parties in interest are charged with notice thereof. It then devolves upon each adverse claimant to see to it that such proceedings are had as will determine his right, not alone against the applicant for patent, who is the common defendant, but also against the other adverse claimants. Until this is done, the stay of proceedings commanded by section 2326 is not relieved and the "controversy" is not "settled or decided by a court of competent jurisdiction." The word "controversy" used in this section includes broadly the right of possession to the area in conflict against all who are contending therefor in the manner prescribed in the statute.

It is also urged by the Mary Mabel owners that the Sierra Nevada owners in an application for patent to the Sierra Nevada, made by them after the rendition of the Sierra Nevada judgment against the Hartford, expressly excluded the conflict between the Mary Mabel and the Sierra Nevada, both that within and that without the limits of the Hartford and that thereby the Sierra Nevada owners waived their claim to the entire Mary Mabel conflict.

An examination of the records in your office shows that the state-


North.
Thanksgiving.
Assumed Dode Line
Dip Point
of Mary Mabel.
Hartford.
MARY MABEL.
Mt. Rosa Placer.
SIERRA NEVADA LODE.
Loc. Shaft
Shaft
Little Montana.

ment of fact involved in this contention is correct, but the result claimed does not follow. It was not necessary for the Sierra Nevada to include in its application for patent the ground for which it had recovered judgment against the Hartford, for as to that ground it had been judicially determined as against all claimants, except the Mary Mabel, that the Sierra Nevada has the better claim. It is not necessary for one who has prosecuted his adverse claim to judgment in his favor to make an original application for patent for the ground included in such judgment, because, under section 2326, Revised Statutes, it can be patented upon a copy of the judgment roll. It was no more necessary for the Sierra Nevada to make application for patent for the ground included in its judgment against the Hartford than it was necessary for the Mary Mabel to make application for patent for the ground included in its judgment. The Mary Mabel, by its posted and published notices, excluded from its application for patent the Hartford conflict, and is now relying upon its judgment against the Hartford as authority for the entry and patenting of that conflict, and the former decision sustains this contention, except as against the Sierra Nevada, whose judgment against the Hartford includes a part of the same ground, and is not less effective than the Mary Mabel judgment.

At the time of the former decision the Department was not fully informed respecting the extent and location of the conflict between the Mary Mabel and Sierra Nevada, but it has since been shown that this conflict lies partly within and partly without the Hartford, so that the conflict between the Hartford and Sierra Nevada for which the Sierra Nevada obtained judgment, is not co-extensive with the conflict between the Mary Mabel and the Sierra Nevada as is apparently assumed in the former decision. In this respect the statement in that decision is corrected and supplemented and the conclusion there announced must be modified accordingly. The plat accompanying the former decision is here reproduced, with the Sierra Nevada shown thereon so as to better illustrate the case as now presented.

The notices of the Mary Mabel application for patent, as shown by the former decision, embraced only ground lying outside of the Hartford, and one claiming any of that ground adversely to the Mary Mabel was required to adverse the latter's application. The Sierra Nevada regularly adversed the Hartford application, and thus asserted its claim to that part of the Mary Mabel lying within the Hartford, but it did not adverse the Mary Mabel's application, and hence lost its opportunity to assert a superior or better right to any portion of the Mary Mabel lying outside of the Hartford.

It is further contended by the Mary Mabel owners that the Sierra Nevada owners "admitted the invalidity of their claim and waived all right to contest the Mary Mabel entry by expressly excluding from their application the ground in the Hartford conflict which contains their discovery shaft." This contention can not be sustained. While

there is nothing in this record showing the location of the Sierra Nevada's discovery shaft, an examination of the plat of survey of that claim on file in your office shows that this discovery shaft is within the Sierra Nevada's conflict with the Hartford, for which the Sierra Nevada obtained judgment, and is within that part of this conflict which lies outside of the Mary Mabel and between the southerly side line of the Mary Mabel and the northerly line of the Mt. Rosa placer. The judgment obtained by the Sierra Nevada in its adverse proceeding against the Hartford fully and finally established the right of the Sierra Nevada to the possession of the ground containing this discovery shaft and entitles it to a patent thereto, without further application or notice, upon filing a certified copy of that judgment, accompanied by the requisite certificate of expenditure and payment of the purchase price and proper fees. Certainly no argument is required to show that an applicant for patent who excludes or omits from his application ground, the right to the possession of which has been regularly and judicially determined in his favor, and for which he can obtain patent without embracing it in such application, does not by such exclusion or omission invalidate or waive any claim or right which he would otherwise have.

Whether the Sierra Nevada will be permitted to make entry of the ground embraced in its patent application without then or thereafter making entry of the ground embracing its discovery shaft does not affect the present case, and will be determined when the question arises.

The protestants, referring to that portion of the former decision which is not complained of by the Mary Mabel owners, insist that it is erroneous in the following respects: (1) That it ignores the decisions in Bi-metallic Mining Co. (15 L. D., 309) and Silver Queen Lode (16 L. D., 186), upon the effect of the intersection of a vein by patented non-lode ground. (2) That there is no evidence showing that the Mary Mabel vein dips out of the Mt. Rosa placer to the north and has any actual existence, on the dip or otherwise, in that portion of the Mary Mabel lying north of the intersection of its assumed lode line. (3) That the former decision disregards the "conclusive presumption of law" that the Mary Mabel vein "absolutely ceases and determines at the point where its assumed course is intersected by the westerly line of the Mt. Rosa placer," "against which no testimony can be received." (4) That a portion of the Mary Mabel vein which is found as a fact to be the dip is erroneously held to be the apex contrary to decisions of the courts defining the term "apex."

The decisions in the Bi-metallic Mining Co. and Silver Queen Lode, *supra*, do not control the disposition of this case. Neither of these decisions presented the case of a vein, otherwise unappropriated, having an actual existence throughout the entire length of a mining claim in land subject to location, occupation and purchase under the mining

laws. The rule announced in those cases is confined to instances where the vein is actually intersected and divided into two disconnected parts and is without application to the case at bar.

It is true that the Mary Mabel vein has not been actually traced on the dip from the point of the Mt. Rosa placer northward into the adjoining Mary Mabel ground, but the existence of the vein through the Mary Mabel, both to the west and east of the point of the placer, has been demonstrated, and that it is enclosed in the same formation and dips to the north at approximately the same degree in both ends of the Mary Mabel ground is shown by the explorations therein. Considering this and the fact that the protestants offered no evidence to the contrary, the existence of the vein in the Mary Mabel ground to the north of the point of the placer is sufficiently proven.

The claimed conclusive presumption of law that the Mary Mabel vein absolutely ceases and determines at the point where its assumed course is intersected by the westerly line of the Mt. Rosa placer, against which no testimony can be received, is not supported by reference to any departmental or judicial decision or by an attempt to state any reason for its existence and does not merit further mention.

The former decision clearly expresses the opinion of the Department respecting what is to be deemed the legal apex of that part of the Mary Mabel vein which dips to the north out of the ground patented as the Mt. Rosa placer, and the argument of the protestants in opposition thereto has not changed that opinion.

Both motions for review are denied, and the former decision is adhered to subject only to the following modification therein, which is now made:

(1) The Mary Mabel entry is sustained except as to the area in conflict with the Little Montana, and except as to the area for which the Mary Mabel and Sierra Nevada obtained conflicting judgments against the Hartford. (2) The Mary Mabel's entry is canceled to the extent of the area for which the Mary Mabel and Sierra Nevada obtained conflicting judgments against the Hartford, subject to the right of the Mary Mabel to enter that area, without giving further notice, should the controversy be adjudicated by a court of competent jurisdiction in favor of the Mary Mabel or the adverse claim of the Sierra Nevada be waived, but unless proceedings to accomplish such adjudication are prosecuted with reasonable diligence, the right to make entry of this area as an adverse claimant under the Hartford application and notice will be lost.

APPLICATION FOR SURVEY—ISLAND.

ARCHIE G. PALMER.

An application for the survey of an island in a meandered non-navigable river will be denied, where the right of riparian owners to the bed of the stream is recognized by the law of the State, and there is no indication of fraud or mistake on the part of the surveyor in omitting such island from the public survey.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 12, 1898.* (C. W. P.)

On November 22, 1897, you transmitted to the Department for its action the application of Archie G. Palmer, of Central City, Nebraska, for the survey of an island in the Platte river, in sections 4, 5, 8, and 9, township 13 north, range 5 west, Nebraska.

Objections to the proposed survey having been filed by William A. Wilder, Christian Miller, and Mrs. John Payne, setting out that the survey, if made, would interfere with their riparian rights, the Department, under date of January 13, 1898, returned the papers to your office, with direction that a hearing be had "to determine whether the facts alleged in the application and affidavits accompanying it are true." See Archie G. Palmer, 26 L. D., 24.

Pursuant to said direction, your office instructed the register of the land office at Lincoln, Nebraska, to proceed to Central City, Nebraska, which is near the land in question, and personally conduct a hearing to determine the facts in relation to the alleged island.

A hearing was had, and on July 5, 1898, the register made a report of the hearing, which, together with the testimony taken at said hearing, you have transmitted to the Department by your office letter of August 15, 1898.

The register finds:

First. That there now exists in the channel of the Platte river in sections 4, 5, 8 and 9 of said township and range, between Prairie Island and Long Island, separated from Prairie Island by a very shallow channel of about forty feet in width, from Long Island by a deeper swift running channel of about 300 feet in width, and from each other by channels of about 100 feet in width, three distinct islands comprising in all about 125 acres of valuable land above high water mark, all of which is suitable for grazing purposes and a part of which is suitable for agricultural purposes, which has never been surveyed by the United States government: Second. That a part of these islands is now fenced with barbed wire fence and occupied by these riparian claimants as pasture: Third. That the land composing these islands existed in character and extent practically as it does now in 1862, when the government survey of said township was made.

Upon an examination of the record, it appears that instead of there being one island in the locality described, containing about one hundred and twenty-five acres of land, as alleged by the applicant, there are several islands, the largest containing from thirty to thirty-five acres, cut through with small channels about twenty-five feet wide, and separated from Prairie Island by a very narrow channel of from forty to sixty feet and from Long Island by a channel about two hundred and fifty feet wide.

Mr. Jewell (a witness for the applicant), who is a surveyor and has known the islands since 1867 or 1868, says they were then "covered with a growth of cottonwood poles and timber from two or three inches in diameter," as near as he can recollect; that "there was a long string of islands there, several of them," and timber on nearly all of them, but he thinks "they were cut through with small channels—more than they are now;" that there was then no meadow or "mow" land on them, but that "it was all covered with brush and timber, as far as he went over it." On cross-examination he says he does not know how many islands there were in sections 4, 5, 8 and 9, when he first examined them; that "there was quite a good number."

Mr. Burroughs (a witness for the applicant) says he has known the islands for thirty-five years; that they were heavily timbered with cedar, cottonwood and some elm and ash, but mostly cottonwood and cedar; that there was then no pasture land on the islands.

Mr. Hilton (a witness for the applicant) says he has known the island since 1861; that it then had timber on it, mostly cedar and willows, also cottonwood.

Mr. Eatough (a witness for the objectors) says he has known these islands since 1863 or 1864; that they were covered with brush at that time. He thinks the largest island contains about thirty acres at the present time; that there are three large islands and several *tow heads;* that two of the large islands are smaller than the one first mentioned, and that the islands are larger than when he first saw them; that he resides within eighty rods of one of them; that the channels separating the islands are at the present time about twenty-five feet wide; on cross-examination he says when he first came there, the islands had some timber on them.

On the facts, as they appear in the record, it seems to be clear that the application for survey should not be granted.

In the case of Hardin *v.* Jordan, 140 U. S., 371, it is said:

As was well said by the supreme court of Illinois in Middleton *v.* Pritchard, (*qua supra*). "Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. What will pass then by a grant bounded by a stream of water? At common law, this depended upon the character of the stream, or water. If it were a navigable stream, or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the centre thread of the current. . . . At common law, only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership in the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation. And this latter, Chancellor Kent says, bears a perfect resemblance to public highways. The consequence of this doctrine is, that all grants bounded upon a river not navigable by the common law, entitle the grantee to all islands lying between the main land and the centre thread of the current. And we feel bound so to construe grants by the government, according to the prin-

ciples of the common law, unless the government has done some act to qualify or exclude the right. . . . The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant."

These views are referred to with strong approval by Chancellor Kent in a note to the third volume of his Commentaries, p. 427, sixth edition, being the last edition prepared under his own supervision.

We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.

And in the cases of John J. Christensen, 25 L. D., 413, and Diedrick C. Glissman, Id., 474, on the authority of the case of the Grand Rapids and Indiana Railroad Company *v.* Butler, 159 U. S., 87, a survey was denied of a small island in a meandered non-navigable river, shown to be in existence at the time of the original survey, where the right of the riparian owners to the bed of the river was recognized by the States in which the islands were situated.

It is admitted that the Platte river in Nebraska is not navigable, and it is held by the courts in that State that grants of land, bounded upon a non-navigable river, carry with them the exclusive title to the grantees to the centre of the streams. See John C. Christenson's case, *supra*, and cases therein cited.

Prairie Island and Long Island were surveyed in 1862, and there is nothing in the evidence to indicate fraud or mistake on the part of the surveyor in not surveying the islands in question, and it should be presumed that the circumstances were such at the time of the survey of the township as induced them to decline to survey the islands, which were then covered with brush and small trees.

The application is therefore denied.

ACT OF JUNE 22, 1874—RELINQUISHMENT—APPLICATION.

HANSON *v.* RONESON.

There is no authority in the act of June 22, 1874, or the amendatory act of August 29, 1890, to warrant a relinquishment of land in favor of one who is not at such time a record claimant therefor, or an actual settler thereon.

No rights are acquired under an application to enter land that is at such time covered by a railroad indemnity selection made in compliance with law. Upon the relinquishment of such selection the right of a resident on said land to enter the same will not be defeated by an adverse claim of prior occupancy, set up on behalf of one who has cultivated and improved the land but not established residence thereon.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 12, 1898.* (L. L. B.)

The NW. ¼ of Sec. 35, T. 126 N., R. 40 W., Marshall, Minnesota, is

within the indemnity limits common to both the St. Paul, Minneapolis and Manitoba and the Hastings and Dakota railway companies.

The right of the former company to make selection of the land is not in issue, for in the case of the same against said Hastings and Dakota company, 13 L. D., 440, it was held that the selections theretofore made by both said companies were illegal and the land declared to be "subject to entry by the first legal applicant or to selection by the company first presenting application therefor."

In pursuance of this decision the tract was selected October 29, 1891, by the Hastings and Dakota company, and subsequently, to wit, May 21, 1892, the said company relinquished it under the provisions of the act of June 22, 1874 (18 Stat., 194), as amended by the act of August 29, 1890 (25 Stat., 369), which said last act extended the privilege to railroad companies to relinquish lands claimed by settlement as well as those covered by filings, and to select other lands in lieu thereof.

Although the company relinquished this land May 21, 1892, such relinquishment was not presented to the local office nor made known to your office until July 31, 1894, when it was filed in the manner hereinafter shown.

This was the status of the land when, March 28, 1893, August Hanson filed in the local office an application to enter the tract under the homestead law, alleging in his affidavit that he had broken thirty acres, of the value of $75.00. His application was rejected, as appears from the endorsement of the register thereon,

for the reason that the land therein described was selected by the St. P., Minn. and Man. R. R. Co., Oct. 16, 1883, and by the Hastings and Dak. Ry. Co. Oct. 29, 1891.

Hanson appealed, alleging in his appeal the irregularity of the Hastings and Dakota company's selection and the illegality of the selection of the St. Paul, Minneapolis and Manitoba company's selection, as held in the said case in 13 L. D., 440.

July 11, 1893, Anders M. Roneson applied to enter the tract, alleging that he had built a house thereon of the value of $30.00. His application was rejected for the same reasons assigned for the rejection of Hanson's application and the additional reason that Hanson's application was pending on appeal. Roneson also appealed.

It might be mentioned that prior to either of these applications, and prior to the date of the railroad relinquishment, Elmer E. Lawrence had applied to enter the same, and although he appealed from the rejection of his application he afterwards failed to pursue his claim, and he is not now a party in interest.

Pending these appeals, and prior to the decision of your office thereon (October 2, 1894), Roneson, in some manner not disclosed in the record, got possession of the relinquishment of the railroad company, and presenting the same to the register and receiver, he was allowed to make entry of the land July 31, 1894.

Thereupon, September 6, 1894, Hanson, in support of his claim to the land, filed in the local office his affidavit, duly corroborated, setting

forth at length his claimed acts of settlement upon the land, together with his application to enter the same, prior to the settlement or application to enter of Roneson, and the intrusion of Roneson thereon, his taking possession of the tract with full knowledge of the claim and occupancy of the affiant, and asked that a hearing be ordered thereon.

The affidavit was forwarded to your office, and by your office letter of October 2, 1894, heretofore noted the action of the register and receiver in rejecting the several applications to enter made by Lawrence, Hanson and Roneson, was affirmed as was also their action in allowing the entry of Roneson on later application accompanied by the relinquishment of the company, and a hearing was ordered on the contest affidavit of Hanson. Lawrence, although notified, did not appear, and the hearing was confined to the conflicting claims of Hanson and Roneson.

At the hearing it appeared that Hanson was residing with his father, who for many years prior to the contest had been cultivating the land in controversy while residing in the vicinity; that in 1890, when his son was nineteen years old, he sold to him, for $200, the improvements, consisting of forty-two acres of breaking and the rest of the land fenced for pasture; that the son had been cultivating and growing crops on the land ever since, though still continuing to reside on his father's claim (he being a single man), to which he moved his crops when harvested. He was in such occupation of the land on March 28, 1893, when, as before mentioned, he applied to enter the same, and also in the latter part of June, when Roneson intruded upon his possession so as aforesaid described, built a house, and about the first of July, following, moved into it with his family, and shortly after applied to make entry therefor. In his oral testimony Roneson says that he obtained the relinquishment from the company, but makes no explanation of how or when he obtained it, or whether he paid a consideration therefor. At the date of the hearing their improvements were about equal in value, and worth from $300 to $400.

Upon these facts the register and receiver found that—

> Neither August Hanson nor Elmer E. Lawrence had at any time any interest, claim or title to or in any part of said land, either in law or in equity,—

and recommended that the entry of Roneson remain intact.

By the decision of your office of January 4, 1897, which is now here on appeal of Hanson, it is held that—

> It has been decided by said letter "F" of October 2, 1894, that you properly rejected the said applications of Lawrence, Hanson and Roneson while the tract was segregated by the selection of the Hastings and Dakota Railroad Company, made October 29, 1891, and it appears that the relinquishment of this tract by said company was not filed in your office until July 31, 1894, and that this tract was not subject to entry until said last named date and that Roneson was the first applicant after said relinquishment and that you properly allowed his entry,—

and that Hanson acquired nothing by his application to enter while the land was segregated by the railroad selection, and that he acquired no settlement right by his cultivation of the land while so segregated.

This case is in some respects *sui generis*. The relinquishment filed by Roneson purports on its face to have been made under the act of June 22, 1874, as amended August 29, 1890, above cited. These acts were passed solely for the relief of settlers who had made entries or other filings of record or (by amendment of 1890) had made settlement upon lands granted to railroad companies after the rights of the company had attached. No authority is given under either of said acts for a railroad company to relinquish any of its lands to a stranger and receive other land in lieu thereof, but such relinquishment must be based upon and made for the benefit of an actual settler "found in possession" thereof. The relinquishment filed in this case was executed May 21, 1892, and purports on its face to have been made "in favor of Anders M. Roneson," while the record shows that Roneson, at the date of the execution of the relinquishment, was not a claimant for the land, and did not actually lay any claim to it either by settlement or otherwise, until June 1893, more than a year after the execution (and, presumably, the delivery to him) of the relinquishment in virtue of which he was allowed to make entry of the land. Upon inquiry at your office it is learned that the company has never applied for other land in lieu of the tract so relinquished. It must be concluded therefore that notwithstanding the relinquishment purports to have been made under the provisions of the said act of June 22, 1874, as amended in 1890, it was in reality an independent relinquishment and presumably made for a consideration other than provided by said act.

The selection of the railroad company must be held to have been made in compliance with law, as there is nothing in the record tending to show the contrary, and it was made by authority of the Secretary in the case of St. Paul, Minneapolis and Manitoba Railway Company *v.* Hastings & Dakota Railroad Company, *supra*.

Neither can it be claimed by Hanson that such relinquishment was due to his contest or affidavit filed with his application to enter, for, as has been shown, the relinquishment was executed in 1892, and Hanson's application to enter was not made until 1893. Although the relinquishment was executed in 1892, it was not filed until 1894; and the unbroken decisions of the Department are that a relinquishment takes effect at the date of its filing. The selection of the company, then, was existing March 28, 1893, when Hanson applied to make entry. An application to make entry of land while it is segregated by a legal appropriation, confers no right upon the applicant. Cooke *v.* Villa, on review, 19 L. D., 442; Clancy *et al. v.* Hastings and Dakota Railway Co., on review, 20 L. D., 135. Had he been a *bona fide* settler on the land, his settlement antedating that of Roneson would have taken effect instantly upon the filing of the company's relinquishment, and he would have been entitled to enter the land as against Roneson, but mere cultivation and improvement of the land, as shown by the facts of this case, unaccompanied by residence thereon, is not such a settlement as will

entitle him to priority over a later resident settler thereon. Roneson is not entitled to the land by reason of having obtained the relinquishment of the company's selection, but because when the relinquishment was filed he was a *bona fide* settler on the land and thereby entitled to make entry, which he did immediately upon the filing of the relinquishment. Had Hanson resided upon the land during his occupation and cultivation and at the date of the relinquishment, he would have been entitled to the land, not because of his application to enter, but by reason of his settlement, which would have antedated that of Roneson.

The decision appealed from is affirmed.

INDIAN LANDS—TRIBAL RIGHTS—ACT OF JUNE 7, 1897.

BLACK TOMAHAWK *v.* WALDRON.

The act of June 7, 1897, making provision for the recognition of the rights of children born of a marriage between a white man and an Indian woman by blood, is inapplicable to the case of a child born of a half-breed woman and a white man, where such woman is not recognized as a member of the tribe, or as having any tribal rights.

Assistant Attorney-General VanDeranter to the Secretary of the Interior, September 13, 1898. (V. B.)

I beg to acknowledge the receipt by your reference of August 19, 1898, of an application and accompanying papers, in behalf of Mrs. Waldron, to reopen the case of Black Tomahawk against her, heretofore decided by this Department, and involving the right to a certain tract of land within what was heretofore known as the Great Sioux reservation within the then Territory of Dakota.

In your reference it is stated that as all the decisions in this case have been rendered on opinions of the Assistant Attorney General of this Department, this motion is also "referred to him for opinion."

The application seems to be alternative in character, invokes the supervisory authority of the Secretary to reopen said case, review and reverse the former decisions of the Department in the premises for alleged errors therein; prays that if the Secretary does not see sufficient cause for doing this then he will order another hearing in the case in order that Mrs. Waldron may have a further opportunity to furnish testimony to show that said decision should be so reversed and revoked.

In order to comply with your request for an opinion on the application I have examined the former decision in the case and the papers sent me with much care.

In pursuance of the provisions of the act of Congress approved March 2, 1889 (25 Stat., pp. 888–889), the Sioux Indians having ceded to the United States portions of their said reservation the same were duly opened to settlement and entry by proclamation of the President.

Said act however provided in effect, "That any Indian receiving and entitled to rations and annuities" at any of the agencies within the unceded portions of said reservation could take an allotment of three hundred and twenty acres of land within the ceded portions to the original reservation.

Mrs. Waldron and Black Tomahawk both selected the same tract of land, within the ceded reservation, and a contest arose between them. Mrs. Waldron appears to be first in time, and therefore if otherwise qualified would have the better right.

But whilst it is conceded that Black Tomahawk is a full blooded Sioux Indian, it appears that Mrs. Waldron, the wife of a white man, is the offspring of a marriage between a white man and a half-breed Indian woman. When, therefore, the case came before Secretary Noble, December 14, 1891, he decided, upon the advice of Assistant Attorney General Shields, that Mrs. Waldron was not an Indian in contemplation of the law and not entitled to an allotment under the provisions of said act. See 13 L. D., 683.

Subsequently a motion for review and reversal of said decision was made, but denied on August 18, 1893, by Secretary Smith, upon the advice of Assistant Attorney General Hall, in an exhaustive opinion reported in 17 L. D., 457.

On January 4, 1894, Secretary Smith transmitted the papers in the case to the Attorney General. In his letter of transmittal the Secretary, after referring to the previous action had in the case, and expressing his adherence to the law relative thereto, as construed by the officers of this Department, stated that, in view of the important questions involved and the interests that may be affected thereby—

> I have deemed it advisable to submit the same for your consideration, and to request your opinion upon all of the questions considered in the opinion of the Assistant Attorney General for the Department of August 18, 1893.

On February 9, 1894, the Attorney General replied, expressing the opinion that the persons entitled to rights under the said agreement between the United States and the Sioux Indians—

> are the persons who at the time of the agreement constituted the Sioux Nation and were lawful members thereof. The question, therefore, whether any particular person is or is not an Indian within the meaning of this agreement is to be determined in my opinion not by the common law, but by the laws or usages of the tribe . . . . They present questions of fact like other usages. Presumptively a person of mixed blood residing upon a reservation and claiming to be an Indian is in fact an Indian. (Famous Smith *v.* United States, 151 U. S., 50.)

The Attorney General, however, declined to express an opinion on the evidence submitted on all the questions considered in the opinion of the Assistant Attorney General, as this would be "to exercise appellate jurisdiction over a decision upon mixed questions of fact and law."

Secretary Smith does not seem to have entirely accepted the views

of the Attorney General; for, in a letter to the Commissioner of Indian Affairs, October 20, 1894 (19 L. D., 311), he said, in relation to the case:

> Upon further considering the matters involved in this controversy, I see no good reason for changing the conclusions heretofore reached by the Assistant Attorney General, on the record then before him, and which conclusions were approved by me.

But as it had been suggested that the laws and usages of the Sioux may have made Mrs. Waldron a member of the tribe "either by furnishing a different rule as to the effect of her birth or by causing her adoption as a consequence of the facts connected with her life," he ordered a hearing, after notice to the parties, for the purpose of ascertaining whether, under the laws and usages of the Sioux Indians, or by adoption Mrs. Waldron was a member of the tribe at the date of the passage of the act of March 2, 1889, or at the date of the agreement between the United States and the Indians. This hearing was had after due notice to all parties, and the report thereof being before the Department, on February 8, 1897 (24 L. D., 145), Secretary Francis adhered to the former decisions, rendered judgment in accordance therewith, saying, in conclusion:

> Mrs. Waldron has had abundant opportunity to establish her rights, if she has any, and has failed to do so. I do not think that a determination of the case should be longer delayed, as to do so would practically be a denial of justice.

At every stage of the case elaborate briefs have been filed in behalf of Mrs. Waldron by her several attorneys, presenting her claims fully to this Department, and the present application, in this respect, is not exceptional.

The elaborate brief of counsel now submitted fails to convince me that there are errors in the rulings of your predecessors which will justify you in reversing them. With one exception all the points now presented by counsel, in that behalf, were discussed before and fully considered and determined. The exception and new matter presented is the construction of a provision found in the Indian Appropriation act of June 7, 1897 (30 Stat., pp. 62–90). That provision is as follows:

> That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood, and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right.

This act was passed subsequent to the decision of Secretary Francis and it is insisted that it covers the case of Mrs. Waldron; in fact, it is asserted, it was passed expressly to cover her case, and that therefore under its provisions you are required to revoke the former departmental decisions and award the land in controversy to her.

There is nothing in the language of the quoted provision, nor of any other portion of said act to show that Congress intended specially to legislate in behalf of Mrs. Waldron: and if it be true, as asserted, that the provision was intended as special legislation for her benefit, the framers of the law seem to have failed in their purpose.

Inasmuch as the decisions heretofore made in this case show that Mrs. Waldron's mother and grandmother were both half-breeds, did not belong to the tribe and were not recognized as belonging to it, but their status was otherwise distinctly defined and provision made for them, *ex gratia*, as such half-breeds, I do not see that the referred to clause of the Indian appropriation act has any bearing whatever on this case or can help Mrs. Waldron in any way. Especially as with abundant opportunity so to do she has utterly failed to show the departmental findings to be incorrect or that, under the laws or customs of the tribe, she or her mother were, or are, respectively, recognized as members of said tribe, or as having any tribal rights.

I am therefore of opinion, that no sufficient reason is shown for revoking the decisions of your predecessors.

In regard to the alternative application for a rehearing in said case: it is to be observed that no definite statement is made as to what is proposed to be proved at the new hearing, if ordered; but it is asserted, in a general way, that Mrs. Waldron's case has not been as well presented as it might have been, and a further opportunity should be allowed her to show that the decisions heretofore made are erroneous and should be reversed. It is not stated what testimony, if any, would be adduced to make this showing: no witnesses are named and it is not asserted that the matters to be shown are "newly discovered." In short, it seems that this alternative application for a rehearing is to the effect that, regardless of all that has been done and determined, during the long years the matter has been before the Department, a trial *de novo* be awarded that it may all be gone over again, in the belief that Mrs. Waldron may be benefited thereby.

I fail to find such legal or equitable considerations in the case, as in my opinion, and I so advise you, call for the exercise of your supervisory authority in the premises, as invoked, but on the contrary, in the interest of the administration of justice I do not think the execution of the deliberate judgment of the Department should be delayed, and so advise the denial of the application.

Approved, September 14, 1898,

C. N. Bliss,

Secretary.

HOMESTEAD ENTRY—AMENDMENT.

Josiah Cox.

The rule permitting the amendment of entries is liberally construed by the Department, particularly where through ignorance or misinformation the entryman is misled as to his rights, and no adverse claim has intervened.

Secretary Bliss to the Commissioner of the General Land Office, September 14, 1898.

(W. V. D.) (H. G.)

Josiah Cox appeals from the decision of your office of December 28, 1896, denying his application to amend his homestead entry, made

January 30, 1894, for the E. ½ of the NW. ¼ of Sec. 1, T. 27 N., R. 14 W., Alva, Oklahoma, land district, in such manner as to include the west half of said quarter section. Your office, on February 27, 1897, denied his motion for a review of such decision.

The application to amend sets forth that the entryman had not, at the time of his entry, sufficient money to pay the fee and commissions of the local office on an entry for the entire quarter section, and that he was advised by an attorney that he could enter one-half of such quarter section and thereafter complete his filing for the remainder. It does not appear that he has resided upon or improved any portion of the tract he now seeks to include within his entry, although his application discloses that he has resided upon the quarter section and has cultivated forty acres thereof, but no particular portion of the quarter section is designated as the locus of such improvements. Neither is it shown that there was no adverse claim existing at the time of the date of the application, which was filed October 19, 1895.

While the same was under consideration by your office, upon the request of the local office for instructions, and on November 16, 1895, one Edward Hoagland tendered his application at the local office to make homestead entry for the same tract which Cox desires to include within his original entry. This application of Hoagland alleges that he, in good faith, made his settlement upon the tract applied for by him, on August 11, 1895, prior to the settlement or claim of any other persons, and prior to any application made by said Josiah Cox for amendment of his homestead entry so as to embrace the tract applied for by Hoagland.

Your office held that, under the circumstances, a hearing was not necessary to determine the question of settlement by Hoagland prior to the application of Cox, for the reason that the latter has not made such a showing as would warrant the allowance of his application to amend his entry, even in the absence of any adverse claim to the land; and as he had made one legal entry for less than one hundred and sixty acres, he exhausted his rights under the homestead laws, and his plea of financial inability to pay the fee and commissions on the entire quarter section can not be accepted as an excuse.

Upon appeal to this Department, this excuse is not urged as a sufficient reason for permitting the amendment, but reliance is put upon the ill advice of the attorney for Cox, the applicant for amendment of his entry.

As a rule, the advice of counsel furnishes no excuse to the client for the violation of law, and can not be relied upon as a defense in either civil or criminal actions, in the courts. But the rule permitting amendment of entries has been very liberally construed by this Department, particularly where parties have been misled through ignorance or misinformation as to their rights, where no adverse rights have intervened. If the entryman fails to get the land which he intended to take, or for

which he supposed he had made application, in the absence of adverse claims, his amendment is allowed. So far as this record discloses, the applicant to amend was entitled to enter the full quarter section which he states he intended to enter at the time of his entry for the east half of such quarter section. If he was misled as to the effect of making such entry and honestly had good reason to believe and did believe that he could postpone entry upon the remainder of the quarter section at the time of entry by keeping up his occupancy or improvement of the portion of such tract which he did not enter, such excuse ought to be deemed sufficient and the amendment ought to be permitted, if no valid claims have been since interposed and are maintained in ignorance of the claim of the entryman for the remainder of the quarter section.

The application of Cox is not as definite and certain as it might have been, nor does he allege that there are no adverse claims for the tract.

The application of Hoagland to make homestead entry for the tract in question discloses that he alleges settlement thereon prior to the application of Cox to amend his entry in order to include such tract.

Manifestly the application of Cox to amend his entry can not be allowed in the face of Hoagland's claim to the same tract, unless the latter made settlement with full knowledge or notice of the rights of Cox and of his improvement of the tract in dispute, or failed to follow up his settlement by application to enter in due time. A hearing should be ordered to determine the rights of the parties. At this hearing it is incumbent upon Cox to establish his right to amend his entry to the satisfaction of the land department.

The decision of your office is modified accordingly, and a hearing will be ordered in conformity with this opinion.

RAILROAD GRANT—FORFEITURE—ACT OF JUNE 22, 1874.

EGGLESTON *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The conditions on which the extension of time was given by the act of June 22, 1874, operate as a revocation of the grant, to the extent of the rights of actual settlers at the date of said act, and their grantees; and such revocation is operative though the lands may have been patented under the grant.

Secretary Bliss to the Commissioner of the General Land Office, September 11, 1898.

(W. V. D.) (G. B. G.)

The land involved in this proceeding is the N. ½ of the NE. ¼ and the SE. ¼ of the NE. ¼ of Sec. 15, T. 130 N., R. 37 W., St. Cloud, Minnesota. This land is within the twenty mile indemnity limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, for which a withdrawal was made February 6, 1872, was selected by said company November 25, 1873, on account of its grant, certified April 30, 1874, and patented to the company January 14, 1875.

April 14, 1876, Charles A. Jones filed his preemption declaratory statement for this land, alleging settlement thereon December 25, 1873.

Said company having failed to construct its road within the time required by the act of March 3, 1865 (13 Stat., 526), or within the extended time allowed by the act of March 3, 1873 (17 Stat., 631), the time was again extended to March 3, 1876, by the act of June 22, 1874 (18 Stat., 203), upon the following conditions:

> That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided upon any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or other persons in all respects the same as if said lands had never been granted to aid in the construction of said lines of railroad.

On July 26, 1880, the governor of Minnesota, under an act of that State of March 1, 1877, extending the time for the completion of said road, and saving and securing the rights of all actual settlers of that date, relinquished the title to the land involved to the United States, the said Charles A. Jones being named as the beneficiary.

On July 9, 1884, George Eggleston applied to make pre-emption filing for said land, alleging settlement thereon February 20, 1883, and claiming that it was excepted from the aforesaid withdrawal of February, 1872. In support of that claim he filed an affidavit by one Acel Cummings, to the effect that Charles A. Jones settled upon said land in the spring of 1871, and resided thereon continuously for seven or eight years.

Thereupon, a hearing was ordered and had. The local officers found in favor of Eggleston, and the railway company appealed.

On February 29, 1888, your office affirmed the decision of the local officers, but on May 17, 1888, upon the company's motion for review, your office recalled its former decision, and, after noting that it appeared by a certified copy of the deed on file that the land in controversy had been conveyed by the State of Minnesota to the railway company, February 23, 1877, five days prior to the passage of the State act of March 1, 1877, held that said law was inoperative as to said tract, and the governor's deed of July 26, 1880, was therefore without authority.

It further appears that in response to correspondence by Mrs. Eggleston, widow of George Eggleston, your office on February 6, 1894, took up and examined the application of the said George Eggleston to make pre-emption filing for said land, and his application was rejected on the ground that the land was not at the date of his settlement and application subject to disposal; that he had acquired no right to it, and could acquire none while the title remained in the grantee railway company.

Eggleston having died, on June 29, 1888, his widow, the said Charlotte Eggleston, filed an appeal from said decision, but the appeal was out of time and therefore denied by your office, whereupon she filed her

petition for certiorari, which was denied by departmental decision of December 6, 1894 (unreported). In that decision it was said:

It appears from her own statement of the case, from the documents, copies of which are transmitted by her that said land was patented to the State of Minnesota for the benefit of the St. Vincent grant on January 14, 1875, and by the State deeded to the St. Paul and Pacific Railroad Company (then owner of the grant). Said patent and deed are still outstanding. Under the circumstances, if the case were before me, I should have to decide that the Department was without jurisdiction to afford the applicant relief.

The case was closed against the applicant December 17, 1894.

On January 28, 1897, after due service of notice upon the railway company Mrs. Eggleston made application to your office that your said office decision of February 6, 1894, be reviewed and recalled, and the land in question awarded to her. This application was denied by your office May 29, 1897. In that decision it was said:

The testimony taken in the case of Eggleston's application shows . . . . that Charles A. Jones was residing on the land in question at the date of said act (referring to the act of June 22, 1874, *supra*), having settled thereon in the summer of 1871, but it is not shown that he was qualified to enter the land under the settlement laws, consequently his settlement availed him nothing; he acquired no rights thereby, and therefore his grantees have no claim that can be perfected under said act.

The appeal of Mrs. Eggleston brings the case to the Department.

Your office decision of February 6, 1894, denying the application of George Eggleston to make pre-emption filing for the land, for the reason that the land had been previously patented to the railroad company, and the said departmental decision of December 6, 1894, denying Mrs. Eggleston's application for certiorari, for the same reason, were erroneous.

In the case of Trounes *v.* St. Paul, Minneapolis and Manitoba Railway Company (18 L. D., 101), it was held by the Department, in reference to the act of June 22, 1874, *supra*, that:

The conditions on which the extension of time was given by Congress in said act operate as a revocation of the grant, to the extent of the rights of actual settlers at the date thereof. It is in effect an extension of the protection intended to be given by the excepting clause in the original grant, and is applicable to all lands, whether patented or otherwise.

The certification of lands prior to the passage of said act in no wise affects the right of an actual settler protected thereby, nor does it embarrass the Department in extending to such settler the protection of said act.

Again, in the recent case of St. Paul, Minneapolis and Manitoba Railway Company *v.* Anderson (26 L. D., 227), it was held (syllabus):

The conditions on which the extension of time was given by the act of June 22, 1874, operate as a revocation of the grant, to the extent of the rights of actual settlers at the date of said act; and such revocation is operative though the lands may have been patented under the grant.

Inasmuch as the protection given by the act of 1874, *supra*, extends to "actual settlers and their grantees" who have theretofore in good faith entered upon and actually resided on any of said lands prior to

the passage of said act, and inasmuch as it is alleged that the facts of record entitle Mrs. Eggleston to the benefits thereof, the record has been examined with special reference to this contention.

It is not material that this case has been closed for nearly four years, it appearing that it involves the adjustment of a railroad grant, and that the decision closing the case was, in reference to the ground upon which it was put, erroneous. There has not been a decision by the Department on the controlling question in the case.

At the hearing ordered between the railway company and George Eggleston, it was shown that the said Charles A. Jones settled upon the land in the spring or summer of 1871, and resided thereon continuously for seven or eight years, when he sold his claim and possessory right to one Austen De Frote; that De Frote sold to one John Rider, and that Rider lived there a short time and sold his claim to George Eggleston in January, 1883. It appearing therefore that Charles A. Jones was a settler on the land involved at the date of the said act of 1874, that George Eggleston was the remote grantee of the said Jones, and that the present claimant is the widow of the said Eggleston, she is entitled to make an entry of said land, if Jones was a qualified settler at the date of said act.

On this question the testimony is meager. The witness Acel Cummings states that he had been acquainted with Jones for sixteen years, but makes no statement as to his citizenship, except to say that Jones told him that he was born in the State of Maine.

George Eggleston states that he, himself, is a naturalized citizen of the United States, but makes no statement as to the nationality of Jones.

John M. Clarno swears that "Mr. Jones was an American and I believe a native-born citizen."

Owing to the long time that has elapsed and the strong equities of the case, it is believed that the ends of justice will be met by accepting this showing. Aside from the testimony above given, the facts and circumstances of the case are such that it is believed that Jones was a citizen of the United States and a qualified entryman. It is highly improbable that he would have settled on the land and lived there for seven or eight years, and put $800 worth of improvements thereon, as is shown by the testimony, unless he were a citizen of the United States or had declared his intention to become such, and it is not probable that the governor of the State of Minnesota would have attempted to reconvey the title to said land to the United States for the benefit of Jones, unless it was conceded by the railway company that Jones had the superior claim thereto.

The decision appealed from is reversed, and the cause remanded, with directions to allow Mrs. Eggleston to enter the land in controversy.

INDIAN LANDS—ACT OF MARCH 2, 1889—COMMUTATION.

AUSTIN G. BRASSFIELD.

On the commutation of a homestead entry of Sioux Indian lands, restored to the public domain under the act of March 2, 1889, the entryman must pay the minimum price of the land, in addition to the payments required under said act, and this is true whether said lands are situated in South Dakota or Nebraska.

Secretary Bliss to the Commissioner of the General Land Office, September 14, 1898.
(W. V. D.) (J. L. McC.)

Austin G. Brassfield, on October 3, 1891, made homestead entry for the NE. ¼ of Sec. 27, T. 34 N., R. 13 W., O'Neill land district, Nebraska.

On April 3, 1896, he was allowed by the local officers to commute the same to cash.

Said land is within that portion of the Great Sioux Indian reservation that was ordered to be restored to the public domain (upon due proclamation) by sections 21 and 26 of the act of March 2, 1889 (25 Stat., 888).

Said section 21 provides that the price paid for said lands shall be—

The sum of one dollar and twenty-five cents per acre for all disposed of within the first three years after the taking effect of this act; and the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter; and fifty cents per acre for the residue of the lands then undisposed of.

Brassfield paid for the land entered by him in accordance with the act above cited. Upon his applying to commute said entry to cash, your office, by letter of September 16, 1896, demanded of him one dollar and twenty-five cents per acre additional. Brassfield appealed, contending that such demand is unauthorized by law.

Section 21 of the act of March 2, 1889 (25 Stat., 888), excluded all the lands in said Great Sioux reservation from the commutation provisions of the homestead act; but by section 6 of the act of March 3, 1891 (26 Stat., 1095), section 2301 of the Revised Statutes was so amended as to allow settlers upon said Great Sioux reservation lands in South Dakota to commute; and by act of November 1, 1893 (28 Stat., 4), the commutation privilege was extended to settlers upon said lands in Nebraska. In both cases, however, it was distinctly provided that such commutation "shall not relieve said settlers from any payments now required by law."

The department has held (see case of South Dakota, 22 L. D., 550; Randall McDonall, 27 L. D., 72;) that upon commutation of an entry of said lands, the entryman must pay the minimum price thereof, in addition to the payments required under the act of 1889.

It is true that the decisions above cited relate to lands situated in South Dakota; but the same laws and principles are applicable in the case of lands formerly within said reservation situated in Nebraska.

The decision of your office appealed from is correct, and is hereby affirmed.

MINING CLAIM—ADVERSE RIGHTS—PROTEST—HEARING.

HUGHES ET AL. *v.* OCHSNER ET AL.

A protestant who fails to assert his alleged adverse interest in the manner provided by the statute, can not, after the allowance of the entry, and in the absence of an allegation of want of notice of the application for patent, be heard in support of such claimed adverse rights.

A failure to comply with local laws and regulations, or to do the annual assessment work, subjects a mining claim to relocation before entry, but constitutes no ground for the cancellation of the entry, in the absence of an adverse claim legally asserted.

Questions as to the fact of mineral discovery, or as to compliance with law in the matter of the statutory expenditure required as a prerequisite to the issuance of mineral patent, afford a proper basis for a hearing, on due showing made by way of protest filed after the allowance of the entry.

Secretary Bliss to the Commissioner of the General Land Office, September 11, 1898.

(W. V. D.) (G. B. G.)

This case involves the lode mining claims of M. H. Ochsner and Frank B. Klock, known as the Crouse, Nichols, Michael, Salina, St. Jacobs, Fryer Hill, Union Bank, Nelson, Lumsden Brink, Clark, Hopkins, Charles and Silver Cave lode, embraced in survey No. 5786, Leadville, Colorado, land district.

These several claims were originally located by one Jacob Rupp, in June, 1888, and by sundry mesne conveyances the title by location vested in the said Ochsner and Klock. These parties, on September 2, 1891, filed their application for patent, upon which publication was made from September 4, to November 3, 1891. During the period of publication nine adverse claims were filed against said application for patent, upon which suits were instituted and subsequently dismissed.

Mineral entry was made December 14, 1895, by the said Ochsner and the heirs of the said Klock. After the entry had been allowed, and on December 24, 1895, Thomas B. Hughes, B. Leppel, John Healey and A. G. Veshofstad filed a protest against said entry, alleging that:

> The surface ground and veins or lodes contained therein, as set forth and described in said plat and field notes, are not the property of said M. H. Ochsner and Frank B. Klock, neither are they, nor any one under them, entitled to hold the same or any of them under or by virtue of the local laws of the State of Colorado, or the statutes of the United States, relative to mining claims.

because, in substance:

1st. The local laws and regulations were not complied with by said claimants, in that they did not post location notices, nor sink discovery shafts to the depth of ten feet.

2d. There was no discovery by the applicants or any one for them of any lode or vein in place bearing gold, silver, or any mineral whatever.

3d. A great portion of the premises described in claimants' application is claimed adversely and owned by the protestants.

4th. The ground embraced in said locations was not open to location, because it was then held as a placer claim.

5th. Neither the applicants nor any one for them performed the annual assessment work of one hundred dollars required by law for any year.

6th. The applicants did not make or perform five hundred dollars worth of labor or improvements upon the said locations or any of them.

On April 9, 1896, your office dismissed this protest, but, noting that the approved plat and field notes of the survey of said claims showed the discovery shaft of the St. Jacobs' lode to be on ground excluded from the entry, required the claimants to show that the vein or lode for which patent is sought extends through or into the claimed ground. The entrymen elected not to comply with the requirements of your office as to the St. Jacobs' lode, and on August 17, 1896, the entry was canceled as to that location.

On the appeal of the protestants to the Department, your office decision was, on April 20, 1898, affirmed (26 L. D., 540).

In the departmental decision it was held: (1) that, in the absence of a showing by the protestants that the alleged failure of the claimants to post notices of location upon the several locations is of material importance in the case, it must be presumed that the local laws and regulations in this regard have been complied with; (2) that it being affirmatively shown that silver ore, assaying from three to twelve ounces per ton, has been found in the discovery shafts of the various locations now comprising said claims, in the absence of any adverse claim or any claim by a party asserting the land to be of a different character from that under which applicants seek title, such showing is sufficient upon that point; (3) that the showing upon the question of annual expenditure was sufficient to have justified the allowance of the entry; and (4) that the law requiring the expenditure of five hundred dollars in development work had, according to the showing made, been complied with.

Protestants filed a motion for review of this decision, which was entertained and which is now refiled with evidence of service.

There is nothing alleged in the protest upon which this proceeding is being had which taken as true gives the protestants a status which entitles them to protection as adverse claimants. It is not alleged by them that they did not have notice of claimants' application for patent, nor does their protest charge that the law in this regard was not complied with. The sufficiency of claimants' showing as to posting notices on the land embraced in their application during the period of publication is questioned indirectly, but this is nowhere made a ground of protest. The *prima facie* showing made by the claimants in this behalf is satisfactory to the government, and the negative testimony offered by the protestants does not raise a reasonable presumption that the law has not been in this respect complied with. It is believed that the protestants had both actual and constructive notice of the application

for patent. The law specifically provides how adverse mining interests may be protected. These protestants did not avail themselves of the only method open to them, and they will not now be heard in support of alleged adverse rights in the premises.

The allegations that claimants failed to comply with the local laws and regulations in the matter of posting location notices and sinking discovery shafts would be material only in a proceeding where adverse claimants to the same land are endeavoring to establish the superiority of their respective claims to possession of the ground in conflict. A failure to comply with local laws and regulations subjects a mining claim to relocation before entry, but furnishes no argument for the cancellation of an entry, in the absence of an adverse claim legally asserted. So with the allegation that the annual assessment work was not performed, if a relocation of the ground has not been made by third parties, because the doing of annual assessment work is not a condition to obtaining patent but only a condition to the continued right of possession to an unpatented claim as against other and adverse claimants.

The allegation that the ground embraced in these locations was not open to location, because it was then held as a placer claim, is without force. The fact that land is held as a placer claim does not necessarily prevent lode locations from being made upon it, and, besides, in this case it appears that the former application for patent to the placer claim was canceled pursuant to departmental decision of July 24, 1891, for the reason that the application was erroneously allowed, in that the ground was shown to be not placer ground, and not subject to location under the placer law.

The allegation that there have been no discoveries of any lodes or veins in place bearing gold, silver, or other mineral upon any of said locations, and the further allegation that five hundred dollars' worth of labor has not been performed or improvements made for the development thereof, are legitimate subjects of inquiry by the government, in the present status of this case, because the existence of a valuable mineral bearing lode or vein and the expenditure of five hundred dollars in labor or improvements are both conditions to the patenting of land as a lode claim under the mining laws.

The *prima facie* showing made by the claimants in this behalf was sufficient to authorize the allowance of an entry, but the showing made by the protestants is such as to cause grave doubts whether the law has been complied with, either in the matter of discovery or the expenditure of five hundred dollars in labor or improvements. There has been no hearing in this case, no opportunity to cross-examine witnesses, and the Department is unable to intelligently decide these questions on the record before it.

It is therefore directed that a hearing be ordered herein, at which the inquiry will be confined to these two questions.

It being alleged that the large shaft on the Salina location is not so situated topographically or geographically as to be of any value whatever in the development of the balance of the ground entered, and it being uncertain whether five hundred dollars' worth of labor has been expended or improvements made upon this ground by claimants or their grantors, unless the value of this shaft may be embraced in the estimate of expenditures or improvements, the ownership, cost, and situation topographically and geologically of this shaft will be a proper subject of inquiry as to whether it tends in greater or less degree or at all to the development of all the locations as required in the proviso to amended rule 53 (26 L. D., 378).

The burden of proof will be upon the protestants to overcome the *prima facie* case already made out by the claimants.

INDIAN LANDS—ALLOTMENT—LAW OF DESCENT.

HARRISON MCCAULEY ET AL.

The allotments made to the Omaha Indians under section 6, act of August 7, 1882, are freehold estates that descend according to the statutes of Nebraska; so that on the death of the allottee his children take subject to the widow's right of dower, and on the death of such children, without issue, the whole estate of the allottee goes to the widow absolutely if she is the mother of such children.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, September 14, 1898. (G. B. G.)

By reference of the Acting Secretary, August 19, 1898, I am asked for an opinion as to the law of descent of land allotted to the Omaha Indians under the 6th section of the act of August 7, 1882 (22 Stat., 341).

It appears that in the month of June, 1898, a "schedule" was filed in the office of the Indian agent, at the Omaha and Winnebago agency, Nebraska, wherein it is claimed that Harrison McCauley and other Omaha Indians are unjustly and unlawfully deprived of and excluded from the use and benefit of the allotments of land of their deceased relatives made under said act.

On June 22, 1898, Chase and Comstock, attorneys for McCauley *et al.*, addressed a letter to the Commissioner of Indian Affairs, asking for information, and were advised by that officer—

> That the lands allotted to the Omahas and Winnebagoes descend, upon the death of the allottee, to his heirs according to the laws of Nebraska.
>
> The Compiled Statutes of Nebraska, 1898 (probably 1897), show that the dower right exists in the widow. When the allottee leaves a widow and one child, and the latter dies without issue during the life of the widow, the widow takes the whole estate, the lesser estate of dower being merged into the greater one of an estate in fee.

Being dissatisfied with the views thus expressed by the Commissioner of Indian Affairs, said attorneys filed a brief with him, wherein it is

stated that in nearly all of the cases represented by them the widow of the deceased allottee of these Omaha lands is taking the rents and profits to the exclusion of the nearest kin and blood relative of such original allottee, and the contention is then made that this is in violation of the trust created by the act under which the allotments were made.

The specific contention made is set out in the brief as follows:

To explain our theory let us suppose that A, a deceased allottee, has left B, an issue, and C, his widow, surviving him, and also D, a near blood relative, perhaps, a brother, sister, or nephew or a niece:

1st. We contend that under the express provisions of the declaration of the trust in these lands, the widow is totally barred of her dower, and the issue B takes the allotment, free of dower.

2nd. That on the death of the issue B, the allotment shifts to the next blood relative of A, regardless of the question of who the heirs of B are.

3rd. That in the case of the death of D, then the allotment shifts again to the next of kin or blood relatives of A, and so on *ad infinitum*, so that we advocate the doctrine of springing or shifting uses which are well established by the principles of equity jurisprudence.

Briefly stated, this contention is based on the idea that the beneficial interests created by the act of August 7, 1882, should be administered under the statute of uses; that these interests are shifting or springing uses, and that they should be executed without reference to the act which created them, except so far as that act may operate as a conveyance. In this view, it is argued that the rule of administration adopted by this Department is defeating the purposes of the statute.

As I view it, the fundamental error of this argument lies in ignoring the fact that the statute creating these beneficial interests is also the law under which they are to be executed.

The statute of August 7, 1882, is both a law and a grant, and the trust thereby created for the use of these Indians must be executed according to the intention of Congress, without regard to a technical jurisprudence which has grown out of the statute of uses in its application to private conveyances. Section 6 of said act is as follows:

That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

This statute is a plain one. The character of the estate granted is clearly defined. The "legal effect" of the trust patents to be issued

thereunder is in terms declared to be that, (1) "the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotments shall have been made," or (2) in case of the death of an Indian allottee, the allotment will be so held for the benefit of "his heirs according to the laws of the State of Nebraska," (3) "that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever," and (4) "that the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered."

The main question presented is, therefore, who are the "heirs" of a deceased Indian allottee "according to the laws of the State of Nebraska."

The character of the estate granted has no bearing on this question, except in determining "the law of descent and partition in force in the said State . . . after patents therefor have been executed and delivered."

The language just quoted evidently refers to the preliminary or trust patents, for the reason that it was already provided that the patent to be issued at the expiration of the twenty-five year period should convey a fee "free of all charge or incumbrance whatsoever," and to say that the law of descent and distribution in said State should apply after a conveyance in fee would be mere surplusage and add nothing to the statute, or be held as intended to operate as a restraint on alienation after a conveyance in fee, a thing which was clearly not contemplated by the statute. The term "fee" alone carries with it an estate of perpetuity, and confers an unlimited power of alienation. In modern estates fee, fee-simple, and fee absolute are synonymous—"simple" or "absolute" adds nothing to the comprehensiveness of the original term. Moreover, to hold that the phrase "after patents have been issued" operates to defer the operation of the laws of Nebraska as to descent upon these lands until after the final patents have been issued would be against the general policy of the government to bring these Indians under the operation of all the laws of the State as fast as practicable. (See opinion of the Assistant Attorney General of August 12, 1898, Vol. 14, page 38.) It results that the law of descent and partition in the State of Nebraska applies and governs the disposition of these allotted lands upon the death of the allottee.

Section 1, of Chapter 23, of the Compiled Statutes of Nebraska provides that:

> The widow of every deceased person shall be entitled to dower or the use, during her natural life, of one-third part of all the lands whereof her husband was seized, of all (an) estate of inheritance at any time during the marriage, unless she is lawfully barred thereof.

The estate created by these allotments and trust patents to the Omaha Indians in the State of Nebraska is an estate of inheritance, so

declared by the federal statute creating them, of which the allottee became seized upon the making of the allotment and the issuance of the trust patent. It is therefore such an estate as will support a dower interest under the Nebraska statutes, and it is not claimed or suggested that the dower right of the widow in any of the cases referred to has become in any way barred.

Section 30, of Chapter 23, of the said Nebraska Statutes, provides that real property shall descend:

First. In equal shares to his children and to the lawful issue of any deceased child by right of representative.

* * * * * * *

Fourth. If the intestate shall leave no issue, nor widow, nor father, and no brother nor sister, living at his death, his estate shall descend to his mother.

* * * * * * *

Eighth. If the intestate shall leave a widow and no kindred, his estate shall descend to such widow.

It having been seen that these allotments are freehold estates, the land would under the law, upon the death of an allottee, descend to the children of the allottee, subject to the dower right of the widow, and upon the death of such child or children without issue, the whole estate of which the allottee was possessed would go to the widow absolutely, if she were the mother of such child or children.

September 14, 1898.

Approved,

C. N. BLISS.

SETTLEMENT RIGHT—ADVERSE CLAIM.

THOMPSON *v.* SLANE.

One who is residing on land under the belief that his title thereto is complete under a warrant location is entitled to enter such tract on the cancellation of said location, and such right will not be defeated by an intervening adverse entry made before the settler is aware of such cancellation.

Secretary Bliss to the Commissioner of the General Land Office, September 14, 1898.

(W. V. D.) (G. R. O.)

On March 18, 1895, John Thompson filed affidavit of contest against homestead entry No. 16200, made December 24, 1894, by Walker H. Slane, for fractional section No. 42, Tp. 1 S., R. 1 E., New Orleans, Louisiana, land district.

Said affidavit alleged, in effect, that the land had been located in 1860 by Cyprian Dupre with school warrant No. 8438, and through several mesne conveyances, had become the property of the contestant; that Thompson had actually resided on the land with his family since 1882, when he purchased it; that he had recently ascertained that the school warrant location, on which his title was based, had been canceled; that subsequent to such cancellation Walker H. Slane had made home-

stead entry for the land, knowing of Thompson's rights in the premises, with the intention of depriving Thompson of his property, and that he (Thompson) had never been notified of the action of your office in cancelling the said school warrant location.

On this affidavit a hearing was ordered by the local officers, and notice thereof was duly served on Slane. Testimony was taken before a notary public under Rule 35 of Practice, and also by deposition under Rule 23. On considering the evidence the local officers rendered a decision, recommending that lots 1 and 2 of said section 42 be confirmed to Thompson, and lots 3 and 4 to Slane. Both Thompson and Slane appealed from this decision, but as Thompson's appeal was not filed in time it was dismissed by your office. Slane's appeal was considered, however, and on February 6, 1897, your office affirmed the decision of the local officers and held his entry for cancellation as to lots 1 and 2, and held that Thompson might be permitted to make entry of said tracts. Slane now appeals to this Department.

There were several irregularities in the manner of appointing a commissioner to take testimony in this case, but your office held that Slane had waived any protest against the method and legality of such appointment, and as no error is alleged by the appellant in your findings on this point they need not be considered here.

The facts appear, from the testimony, to be as follows:

The land in question is a narrow strip, one mile in length, and is divided into four lots, numbered consecutively 1 to 4, from north to south. Elm Bayou, running in an easterly direction, crosses the section at a point near the middle. Lot 1 and nearly all of lot 2 lie north of this bayou, and lot 4 and nearly all of lot 3 lie south of it. The land was located by Cyprian Dupre in 1860, with school warrant No. 8438. After several mesne conveyances a portion of it was purchased in 1882 by John Thompson, the contestant herein. The portion purchased by Thompson lay north of Elm Bayou and included most of lots 1 and 2. Thompson established a residence upon said lot 2 at the time of his purchase and has continued to reside thereon since, with his family, believing that he had a perfect title to said land. Your office, on October 4, 1894, canceled the school warrant location upon which Thompson based his title to the land occupied by him, but Thompson had no notice of such action. On December 24, 1894, Slane, finding that the land was vacant, filed homestead application for all of said fractional section 42, and in January, 1895, he established a residence on that part of said land lying south of Elm Bayou. When Thompson ascertained that Slane had been allowed to make this homestead entry he filed the contest as stated above, and asked that Slane's entry be canceled and that he be allowed to enter the land.

The case of Burke *v.* Gamble (21 L. D., 362), was similar to this. Burke had purchased land which had been selected as indemnity school land by the State of California, and had been in possession of the same

for several years. The State selection was afterwards canceled, and before Burke had notice of such cancellation Gamble was permitted to make homestead entry of the land. A contest was had and the case coming to this Department for decision it was held that Gamble had sought to take advantage of Burke's ignorance in the matter of the status of the State's title, under which he claimed, and that it was clearly the duty of the Department to protect Burke in his possession. Following the ruling in said case Slane's entry will be canceled as to lots 1 and 2 of said section and Thompson will be allowed to make entry thereof.

It does not appear that Thompson ever claimed title to lots 3 and 4, south of Elm Bayou, or that he ever occupied or improved said tracts. He cannot now, therefore, in the presence of Slane's homestead entry, claim a right to enter these lots, and Slane's entry will be held intact as to them.

It is urged by counsel for Slane that, if Thompson is allowed to make entry of any of the land, he should be confined to the land north of Elm Bayou, as he has occupied none of the land south of it. As the entry must be made by legal subdivisions, and a portion of lot 2, on which Thompson has his improvements, extends south of the bayou, it is evident that Thompson's entry must include land on both sides thereof.

It is asserted by counsel for Slane, in his appeal, that Thompson is endeavoring to secure title to this land for the benefit of parties other than himself. There is nothing whatever in the testimony, however, which tends to sustain this contention.

For the reasons stated, your decision is affirmed. Slane's entry will remain intact as to lots 3 and 4 and will be canceled as to lots 1 and 2, and Thompson will be allowed to make entry of said lots 1 and 2.

ANNIS *v.* NAYLOR.

Motion for review of departmental decision of July 1, 1898, 27 L. D., 163, denied by Secretary Bliss, September 16, 1898.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

WOLKE *v.* ST. PAUL AND NORTHERN PACIFIC R. R. CO.

A settlement made under the belief that the land belongs to a railroad company, and under contract to purchase the same from said company, is no bar to the company's right of indemnity selection.

Secretary Bliss to the Commissioner of the General Land Office, September 16, 1898.

(W. V. D.) (G. R. O.)

Your office, by decision of September 21, 1896, approved the action of the register and receiver at St. Cloud, Minnesota, in rejecting the

application of Anton Wolke, filed September 6, 1895, to make homestead entry of the W. ½ of the NE. ¼ and E. ½ of NW. ¼ of Sec. 13, T. 41 N., R. 30 W. Said application was rejected because—

the land applied for is in an odd-numbered section, within the 30 mile indemnity limits of the grant to the Northern Pacific R. R. Co. Also within the twenty mile indemnity limits of the former Brainerd branch of the St. Paul and Pacific (now St. Paul and Northern Pacific) Railroad, and selected by said last named company in list of December 31, 1877, and in revised list of Feb'y 12, 1892.

Wolke accompanied his application with a corroborated affidavit, setting forth that he settled upon the land about July 17, 1877, under an agreement to purchase it from the railroad company; that ever since he has continuously occupied, cultivated and improved the same; that when he settled upon the land he designed to acquire title thereto for a home for himself; that he has improvements upon the land of the value of at least $1200.00, and has over 100 acres under cultivation; that he has recently been informed by the railroad company, and by other persons, that the title to the land is in the United States, and that the railroad company cannot make title thereto, and for this reason he makes this homestead application.

It does not appear from this affidavit which railroad company he made this agreement to purchase with. In the brief accompanying his appeal he states that it was the "Western Pacific R. R. Company." It is presumed, however, that this is an error, and that the "Western R. R. Co. of Minnesota" is meant. Said company, since May 9, 1883, has been known as the "St. Paul and Northern Pacific R. R. Co.", which is the defendant herein.

The records of your office show that this land was withdrawn from settlement and entry on July 10, 1865. This withdrawal was revoked on May 22, 1891. The land was included in an indemnity list filed by the St. Paul and Northern Pacific R. R. Company on December 31, 1877, but the land in lieu of which this selection was made was not named in this list. On December 4, 1889, said company filed another list including this land, and naming as a basis therefor land in Sec. 29, T. 45 N., R. 29 W. On February 12, 1892, it filed a re-arranged list, again including this tract, and specifying as a basis land in Sec. 25, T. 37 N., R. 30 W. Under the ruling in the cases of La Bar *v.* Northern Pacific R. R. Co. (17 L. D., 406), and Southern Pacific R. R. Co. *v.* Davis (26 L. D., 595), this list of February 12, 1892, making a different specification of losses, was an abandonment of the former selections, and the company's right to the land cannot be held to have attached until that date. The order of withdrawal was revoked on May 22, 1891, and from that date until February 12, 1892, the time when the company selected the land, said tract was subject to entry and settlement. Therefore, if Wolke was a qualified homestead settler upon the land on May 22, 1891, his right to the same is superior to that of the railroad company.

He states, however, in the affidavit accompanying his application,

that he settled upon the land under an agreement to purchase it from the railroad company, and it does not appear that he had any intention of securing title to it in any other way than by purchase from said company, until a short time before he applied to enter it, when he was told that the railroad company could not give him title thereto.

Numerous decisions of this Department have established the rule that settlement upon land, in order to except it from a grant to a railroad company, must be made with the intent of acquiring title thereto under the settlement laws. See Central Pacific R. R. Co. *v.* Hunsaker (27 L. D., 297), Tubbs *v.* Northern Pacific R. R. Co. (27 L. D., 86).

And in the case of Northern Pacific R. R. Co. *v.* Flannery (22 L. D., 143) it was said:

> Flannery having entered into a contract with the company for the purchase of these lands prior to the selection of the same by the company, it must be presumed that the subsequent selection made by the company was on account of and for the protection of Flannery under his contract entered into as before stated. His subsequent actions show that he has relied upon the company's title since making said contract and he cannot be held to have acquired any rights by his subsequent residence upon and improvement of this tract that would defeat the company's right under its selection made as before stated.

In the case at bar Wolke settled upon the land, not with any intention of claiming it under the settlement laws, but believing it to belong to the railroad company, and having a contract to purchase it from such company. It was not until after the company's selection of February 12, 1892, had been made that he changed this intention. His settlement under such circumstances was no bar to the company's right to select the land as indemnity, and his homestead application must be rejected. For the reasons stated above your decision is affirmed.

RAILROAD GRANT—WITHDRAWAL—CONFLICTING GRANTS.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO. *v.* ST. PAUL AND SIOUX CITY R. R. CO.

Under the grant of July 4, 1866, to the State of Minnesota in aid of the construction of a railroad, in which indemnity is provided where the numbered sections have been "reserved by the United States for any purpose whatever," at the time when the line of said road is definitely located, no rights attach to lands included in the prior indemnity withdrawal made on behalf of the grant to the same State under the acts of March 3, 1857, and May 12, 1864; and aside from said indemnity withdrawal, if the lands are needed in the satisfaction of the prior grant they were appropriated for that purpose as against the grant of 1866.

The case of Wisconsin Central R. R. Co. *v.* Forsythe, 159 U. S., 46, cited and distinguished.

Secretary Bliss to the Commissioner of the General Land Office, September 16, 1898.

(W. V. D.) (F. W. C.)

An appeal has been filed on behalf of the Chicago, Milwaukee and St. Paul Railway Company from your office decision of October 30,

1896, holding for cancellation its listing of the NW. ¼ of the NW. ¼ of Sec. 29, T. 104 N., R. 34 W., Marshall land district, Minnesota.

This tract is within the primary limits of the grant made by the act of July 4, 1866 (14 Stat., 87), to the State of Minnesota, to aid in the construction of a railroad from Houston, Minnesota, to the western boundary of said State, as adjusted to the line of definite location shown upon the map filed December 10, 1866.

This grant was by the State conferred upon the Southern Minnesota Railway Company, afterwards known as the Southern Minnesota Railway Extension Company. The present owner of the grant is the Chicago, Milwaukee and St. Paul Railway Company.

The grant made by said act was of

every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road; but in case it shall appear that the United States have, when the lines or route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, etc.

The tract above described was listed by the Chicago, Milwaukee and St. Paul Railway Company on April 2, 1896, as part of the land granted to aid in the construction of said road. Your office decision appealed from holds that the tract was excepted from said grant because withdrawn on August 10, 1865, on account of the grant made by the act of March 3, 1857 (11 Stat., 195), to aid in the construction of a road from St. Paul and from St. Anthony, *via* Minneapolis, to a convenient point of junction west of the Mississippi river, and thence to the southern boundary of the State. This grant was also made to the Territory, afterwards State, of Minnesota, and was by the State conferred upon the Southern Minnesota and Minnesota Valley Railroad Company; the present owner of the grant being the St. Paul and Sioux City Railroad Company.

The grant made by the act of March 3, 1857, was of the odd sections within six miles of the road, with an indemnity limit of fifteen miles on each side of the road. This grant was by the act of May 12, 1864 (13 Stat., 72), increased to ten miles, the indemnity limits extending twenty miles on each side of the road.

On June 28, 1865, the map of definite location of the St. Paul and Sioux City railroad was filed, showing the location from Sec. 31, T. 107 N., R. 31 W., to Sec. 30, T. 104 N., R. 39 W. Upon said location withdrawal was made by your office August 10, 1865, and the limits adjusted to said location show that the tract in question fell more than ten miles from the line of location, but within the fifteen mile limit as

established under the original grant. This withdrawal continued unrevoked until May 22, 1891. Any claimed right in this tract on account of the grant made by the act of March 3, 1857, and May 12, 1864, *supra*, would be limited to the right of selection to make up a possible deficiency in the grant.

This tract was selected by the St. Paul and Sioux City company on August 4, 1893, but no action appears to have been taken upon said selection. As to whether said tract will be needed in the satisfaction of the grant to the St. Paul and Sioux City company, your office decision does not state; but upon inquiry at your office it is learned that a preliminary adjustment of said grant shows a deficit.

From the above recitation it is apparent that this tract was put in reservation on account of the grant made to aid in the construction of the St. Paul and Sioux City railroad prior to the grant under which appellant lays claim. Certainly after this withdrawal the Sioux City company had the right to come into the indemnity limits and select this tract if the same was needed to supply a tract lost to the grant within the primary limits.

While it is true that until selection was made the title remained in the government subject to its disposal at its pleasure, the question arises: Did Congress make such disposition of this tract by the grant under which appellant claims as divested the Sioux City company of its right of selection, the same not having been exercised before the attachment of rights under the grant under which appellant claims?

It will be seen that the grant of July 4, 1866, *supra*, made it the duty of the Secretary to cause to be selected, within the indemnity limits of the grant therein provided for, an amount of lands equal to that which had been reserved by the United States for any purpose whatsoever at the time of the definite location of said road.

That this tract became reserved land after the withdrawal of August 10, 1865, can not be seriously questioned, and that such a withdrawal is respected in claims arising under subsequent railroad land grants has been clearly established by a long line of decisions both by this Department and the courts.

It is urged, however, that the case here presented is precisely like that considered by the court in the case of Wisconsin Central Railroad Co. *v.* Forsythe, 159 U. S., 46, because both the grants made by the acts of 1857 and 1866 were to the same grantee, namely, the State.

A careful examination of said opinion, however, will show the facts to be dissimilar in many particulars.

As stated by the court in the case of the Northern Pacific Railroad Co. *v.* Musser-Sauntry Co., 168 U. S., 604–8, —

> While it is true that the intent of Congress in respect to a land grant is to be determined by a consideration of all the provisions of the statute, and that the word "reserved" may not always be held to include lands withdrawn for the purpose of supplying possible deficiencies in some prior land grant, yet, as that is the ordinary scope of the word, if any narrower or different meaning is to be attributed

to it in this grant the reasons therefor must be clear. The use of a word which has generally received a certain construction raises a presumption that Congress used it in this grant with that meaning, and it devolves on the one claiming any other construction to show sufficient reasons for ascribing to Congress an intent to use it in such sense.

In the case of Wisconsin Central Railroad Co. *v.* Forsythe, *supra*, in looking to the intent of Congress in the act of May 5, 1864 (13 Stat., 66), then under consideration, it is stated:

What did Congress intend by that act? It had in 1856 granted to the State of Wisconsin six sections per mile to aid it in the construction of a road from Madison or Columbus, by way of Portage City, to the St. Croix River or Lake, and thence to the west end of Lake Superior, and to Bayfield, with a proviso that if the road was not completed within ten years the unsold lands should revert to the United States. Wisconsin had accepted this grant, and thus impliedly undertaken to construct the road. It made the La Crosse and Milwaukee Railroad Company the beneficiary of this grant. Subsequently, with the assent of the State, that company had transferred to the St. Croix and Lake Superior Railroad Company so much of the grant as was designed to aid in the construction of that part of the road from the St. Croix River or Lake northward to Lake Superior, with the branch to Bayfield. Eight years had passed, and only two years more remained until the expiration of the time fixed for the completion of the road. Only a short distance had in fact been built, to wit, 61 miles from Portage to Tomah, and that by the St. Croix and Milwaukee company in the spring of 1858. It was evident that the inducement of six sections per mile had not been sufficient to secure the construction of the road in the comparatively uninhabited portions in the northwestern part of the State, and so Congress determined to enlarge its grant in order to secure the accomplishment of the desired end. At the same time it perceived that the public interests required an additional road running through the central portion of the State northward to the two termini on Lake Superior, named for the road from St. Croix Lake or River.

And so it passed the act of 1864. This made a grant to the same grantee, to wit, the State of Wisconsin, but expressed the terms and purposes in three separate sections. Congress evidently knew that at the time two companies had been named by the State of Wisconsin as the parties to construct the road provided for by the act of 1856. So, in the first section, it made a grant of ten sections per mile to aid in the construction of a road from St. Croix River or Lake to the west end of Lake Superior, with a branch to Bayfield; in the second, a grant in substantially like terms for a road from Tomah to the St. Croix River or Lake; and in the third, a grant also of ten sections per mile to aid in the construction of a road from Portage City, Berlin, Doty's Island, or Fond du Lac, as the State should determine, in a northwesterly direction to Bayfield, and then to Superior, on Lake Superior. In each of these three sections it named the State of Wisconsin as the grantee. Although it knew that the State had made two separate companies the beneficiaries of the act of 1856, it made no grant to those companies. It dealt in all three sections with the State, relying upon the State as the party to see that the roads were completed, and to use its own judgment as to the manner of securing such construction. The act of 1864 was, therefore, a mere enlargement of the act of 1856, was made to the same grantee, was *in pari materia*, and is to be construed accordingly. It is not to be treated as an independent grant to a different party, and, therefore, liable to come in conflict with the rights of the first grantee.

In that case no claim was being urged to the land under consideration on account of the prior grant for the Omaha company, on whose account the prior withdrawal was made, for, as appears from the statement of facts preceding the opinion, on February 12, 1884, the Omaha

company entered into an agreement with the Wisconsin Central Railroad Company by which the Omaha company consented that the Central company might take patents to all lands in the overlap lying east of the easterly ten mile limit of the Bayfield branch of the Omaha company and north and east of the westerly ten mile limit of the Central company; in accordance with which agreement the State patented the lands in controversy in that case to the Wisconsin Central Railroad Company. It will thus be seen that the original grantee, namely, the State, had by its patent apportioned this land to the Wisconsin Central company.

In the case under consideration, while the original grants were to the same grantee, yet they were afterwards conferred upon separate companies, and the roads have been constructed as separate lines in full compliance with the acts of Congress.

While the State remains a trustee to receive the title for the benefit of the several companies upon whom she has conferred the grants, yet in determining their rights under the several acts of Congress to aid in the construction of the separate roads, no special reason appears in the present case for giving to the words of exception from the grant made by the act of July 4, 1866, *supra*, under which appellant claims, any other than their ordinary meaning.

As before stated, the land in question was put in reservation prior to the passage of the act of July 4, 1866, under which appellant claims, and for the purpose of preserving it for the satisfaction of the prior grant. (It was especially excepted from the grant made by the act of 1866, because of its reserved character,) but aside from the indemnity withdrawal as it has been selected on account of the prior grant, it is presumed to have been found necessary to resort to the same in the satisfaction of that grant, and if it is necessary in the satisfaction of the prior grant, it is clear that the right remained in the Sioux City Company to resort to the same by selection after the grant made by the act of July 4, 1866, and the definite location thereunder, being so needed it was appropriated as against the subsequent grant.

St. Paul and Pacific R. R. *v.* Northern Pacific R. R., 139 U. S., 1–19.

United States *v.* Colton Marble and Lime Co., 146 U. S., 615–616.

Your office decision is accordingly affirmed and the listing by the St. Paul company will be canceled. The selection by the Sioux City company if otherwise regular and proper will be submitted for approval.

MINERAL LAND—SCHOOL INDEMNITY SELECTION.

SWANK ET AL. *v.* STATE OF CALIFORNIA ET AL.

Prior to the approval of a school indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

Secretary Bliss to the Commissioner of the General Land Office, September (W. V. D.) *16, 1898.* (F. L. C.)

The land involved in this case is the $SE\frac{1}{4}$ of $SE\frac{1}{4}$ of Sec. 19, and lots 7 and 8 of Sec. 30, T. 2 N., R. 12 E., M. D. M., Stockton, California, land district. It amounts to 67.57 acres and was applied for November 12, 1892, by the State of California as indemnity school land under its grant by the act of March 3, 1853 (10 Stat., 246).

On June 25, 1895, there was filed the affidavit of W. J. Swank and D. Jutton, as owners of the Union Gravel Mine, of the same and Philip Rowe as owners of the Republic Quartz claim, of W. R. Womble as owner of the Justice Quartz claim, of David Cabrera as part owner of the Last Chance—also known as the Cavere—Quartz claim, and of James Adams as owner of the Dublin Quartz claim, alleging that these several mining claims conflict with the selection of the State, and that the land embraced in said selection is valuable only for its minerals. A hearing was thereupon duly ordered, and was held in November, 1895, to determine the character of the land. The mineral claimants, the State, and J. D. McCarty, as transferee of the State, appeared at the hearing.

The evidence produced is conflicting; but after considering the same the local officers held, December 16, 1895, that the land is mineral in character and recommended that the indemnity selection of the State be rejected. Upon appeal by the State your office on April 1, 1896, affirmed the decision of the local officers. The State and McCarthy prosecute further appeals to the Department.

W. J. Swank is one of the protestants and testified in their behalf at the hearing. Philip Swank was one of the witnesses for the State at the hearing, and respecting his testimony the local officers in their decision say:

> Philip Swank, one of the witnesses for the defense, and a man who has lived on lands adjacent to the tract in contest for over twenty-six years, and who has used said lands for grazing purposes, and also cultivated "four or five acres on the Union Gravel claim," testifies positively, in answer to the question of the defendant's attorney, that the land is,—all of it, in his opinion,—"worth more for mineral"—than for any other purpose; and "I don't consider any of it fine grazing land;" and further in answer to a question by protestants' attorney he says: "if the sixty acres of land in contest were enclosed, six or seven head of stock, confined thereto for a year, would have pretty short grub." This witness knows the tract of land involved in this contest better perhaps, than any other living man, and though he was called as a witness by the defense and questioned closely and carefully by the

defendant's attorney as touching the character of said lands and the purposes for which they are the most valuable, he unhesitatingly declared that they "are most valuable for mineral."

* * * * * * *

It is contended by counsel for defendant that a large part of the Union Gravel claim is good farming land, and that the remainder of that and of the Mosier Gravel claims is more valuable for grazing than for mining or any other purpose; but Philip Swank, their principal witness, and the person whose knowledge of this land, by reason of his long residence in its immediate vicinity, is better than that of any other witness who testified at the hearing, and whose evidence should, therefore, be entitled to the greatest weight.

Since the appeal to the Department the State has filed, in connection with its said appeal, two affidavits, respectively made by W. J. Swank and Philip Swank, as follows:

STATE OF CALIFORNIA,
County of Calaveras, ss.

William J. Swank, being duly sworn, says: That he was the claimant to what was called the "Union Placer Mining Claim" and was one of the protestants in the case of William J. Swank *et al. vs.* the State of California, involving the SE¼ of the SE¼ of Sec. 19, and lots 7 and 8 Sec. 30, T. 2 N., R. 12 E., M. D. M. That he has since prospected said land and found it of no value for mining purposes and that it contained no gold in quantities that will pay to mine; that affiant has abandoned said mining claim or land, and that he believes the same to be more valuable for agricultural purposes than for mining. That a portion of this land has since been plowed and is good agricultural land.

Also that the land embraced in the so-called Mosier Placer Claim is now also plowed and there has been no mining done thereon since the hearing of this case or for years previous and that said land is of no value for mining but is good agricultural land.

WILLIAM J. SWANK.

Subscribed and sworn to before me this 9th day of July, 1898.
(SEAL.) J. F. BAKER,
Notary Public in and for Calaveras county, State of California.

STATE OF CALIFORNIA,
County of Calaveras, ss.

Philip Swank being duly sworn, says: that he was one of the witnesses in the case entitled "W. J. Swank *et al. vs.* State of California and Jackson D. McCarty, involving SE¼ of the SE¼ of Sec. 19 and lots 7 and 8 Sec. 30, T. 2 N. R. 12 E., M. D. M." That at the time the evidence was taken in said case, he testified that the "Union Gravel Mining Claim" which was claimed and protested by his son, William J. Swank, who after prospecting said claim or land has found it of no value for placer mining and has abandoned the same; that upon examination of said land this affiant now believes it to be of no value for mining and that it is more valuable for agricultural purposes; that he has since seen a portion of the land plowed with a three-gang plow drawn by eight horses, and affiant is of the opinion that said land is good agricultural land, and that no portion of the aforesaid land is of any value for mining purposes.

PHILIP SWANK.

Subscribed and sworn to before me this 23 day of July, 1898.
(SEAL.) J. F. BAKER,
Notary Public in and for Calaveras county, State of California.

Copies of these affidavits were served by appellants upon counsel for the protestants August 24, 1898, but no showing has been made in opposition thereto.

Considering that the evidence produced at the hearing is conflicting, and that the portion thereof which sustains the mineral character of the land is in some respects uncertain and based upon theory rather than upon actual knowledge of the value and extent of the claimed mineral deposits; and considering that W. J. Swank, one of the protestants, who was a witness in their behalf, has by his said affidavit practically withdrawn his protest and has declared that subsequent prospecting and cultivation of said land has shown it to be agricultural in character, and not mineral; and considering that Philip Swank, one of the witnesses upon whose testimony the local officers placed such great reliance in reaching their decision, also declares by his affidavit that the land has since been shown to be agricultural land and of no value for mining purposes, a decision upon the record now before the Department would be altogether unsatisfactory and might do violence to the real facts as they exist. It is therefore directed that the record be returned to the local officers with directions to order a supplemental or additional hearing herein for the purpose of obtaining, if possible, further and better evidence respecting the character of this land. At that hearing the State will be required to take the burden of proof and to present the said W. J. Swank and Philip Swank as witnesses in order that the matters covered by their said affidavits may be fully presented and explained and opportunity given to protestants for cross-examination in that connection. The controversy will then be determined upon the evidence produced at the two hearings as though there had not been any decision up to this time.

It will be of advantage to now determine one of the questions in controversy in the case as it bears upon the evidence which may properly be produced at the supplemental hearing.

It is conceded by the defendants that the land is not subject to the State's selection if it was of known mineral character when the application of the State was filed, but it is contended that the subsequent discovery of mineral therein could not affect the right of the State. This contention is not sound. The law governing the right of the State to indemnity school land is in every essential respect similar to the law governing the right of a railroad company to select indemnity lands under its grant. In the case of Walker *v.* Southern Pacific R. R. Co. (24 L. D. 172), the Department held (syllabus):

"Prior to the approval of a railroad indemnity selection the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States."

See especially the language of the supreme court in Wisconsin Railroad Co. *v.* Price (133 U. S. 496), quoted in the case above cited, as to the effect of indemnity proceedings prior to the approval by the Secretary of the Interior.

RAILROAD RIGHT OF WAY—INDIAN LANDS—ALLOTMENT.

CHOCTAW, OKLAHOMA AND GULF R. R. CO.

The act of February 18, 1888, and the acts amendatory thereof provided for a right of way over Indian lands then held under tribal occupancy, or under the laws and usages of the Indian nations or tribes, on just compensation to the Indians therefor; but the provisions so made are inapplicable to lands now held under individual allotments, and confer no right of way privileges as to lands thus held.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, September 17, 1898. (W. C. P.)

By note of March 29, 1898, you referred to me, "for an opinion," a letter of the Commissioner of Indian Affairs, dated March 19, 1898, and accompanying papers, relating to the claim of the Choctaw, Oklahoma and Gulf Railroad Company for a right of way across the allotted lands of the Cheyenne and Arapahoe Indians.

The Commissioner states that, from correspondence with the agent for the Indians, it appears the railroad company is constructing its road westward from Fort Reno, Oklahoma, the proposed line crossing certain Cheyenne and Arapahoe Indian allotments, that the company denies liability on its part to pay for a right of way across such lands, basing its denial upon decisions of the Supreme Court of Oklahoma holding that homestead claimants on the ceded portion of the former Cheyenne and Arapahoe reservation have no valid claim for compensation for the right of way across their lands, but that the company has expressed a willingness to pay a reasonable sum for such improvements upon these allotments as may be destroyed or damaged by the building of its road.

He cites several provisions of law affecting the question, expresses the opinion that Indian allottees "are entitled to full compensation for the lands embraced in the right of way and station grounds, and for all damages done by reason of the construction of the road," and submits the papers in the case "for the opinion of the Department as to the legal rights of the Cheyenne and Arapahoe allottees in the premises."

The act of February 18, 1888 (25 Stat., 35), provides:

> That the Choctaw Coal and Railway Company, a corporation created under and by virtue of the laws of the State of Minnesota, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory.

After this follows a designation of the points at which the road is to begin and end, and the right of way is provided for by section two, which, so far as it is material here, is as follows:

> That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way one hundred feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company.

The act further provided that where the road should be constructed through any lands held by individual occupants according to the laws and usages of any Indian nation or tribe, full compensation should be made to such occupant for all property taken or damage done thereby, and a plan for ascertaining such damages was provided. In addition to such compensation to individuals the company was required to pay, for the benefit of the tribes or nations through whose lands the road might be constructed, the sum of fifty dollars for each mile of road built in said Territory, and also to pay, so long as the Territory should be owned and occupied by the Indians, the sum of fifteen dollars per annum for each mile of railway it constructed in said Territory. The company was also required to file maps of its located line in this Department and with the principal chief of each nation through whose lands such line might be located, to be approved by the Secretary of the Interior, and begin construction within six months after filing any map of location.

This act of 1888 was amended by that of February 13, 1889 (25 Stat., 668), the only change being a provision for the extension of a branch line through the section then occupied by the Cheyenne and Arapahoe Indians and where the allotments in question have since been made. The Choctaw Coal and Railway Company having become insolvent, a sale of its property was necessary, and Congress, by the act of August 24, 1894 (28 Stat., 502), provided that the purchasers of the rights of way, railroads, franchises and other property, "shall be, and are hereby constituted a corporation and shall be vested with all the right, title, interest, property, possession, claim and demand," of, in and to such property of the Choctaw Coal and Railroad Company, "and with all the rights, powers, immunities, privileges, and franchises" theretofore granted to or conferred upon said company by any act of Congress. The Choctaw, Oklahoma and Gulf Railroad Company is claiming the right to construct this line of road as the successor of the former company, under the provisions of this act of 1894.

At the dates of the original act of 1888 and the amendatory act of 1889, the Cheyenne and Arapahoe country was embraced in the Indian Territory but afterwards fell within the boundaries fixed by the act of May 2, 1890 (26 Stat., 81), for the Territory of Oklahoma. In that act is a provision in respect to the rights of Indians, as follows:

> That nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property, or other rights which it would have been competent to make or enact if this act had not been passed.

The only other provision of this act that need be referred to here is found in section eighteen, as follows:

> No part of the land embraced within the Territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for

stations heretofore granted to certain railroad corporations. Nor shall any provision of this act or any act of any officer of the United States, done or performed under the provisions of this act or otherwise, invest any corporation owning or operating any railroad in the Indian Territory, or Territory created by this act, with any land or right to any land in either of said Territories, and this act shall not apply to or affect any land which, upon any condition on becoming a part of the public domain, would inure to the benefit of, or become the property of, any railroad corporation.

The Cheyenne and Arapahoe Indians continued to occupy their lands as a reservation until by an agreement made in 1890 and ratified by the act of March 3, 1891 (26 Stat., 989–1023), they ceded all their right in the lands of their reservation, subject to the allotment of land in severalty to the individual members of said tribes. It was agreed that out of the lands ceded each member of said tribe should have the right to select one hundred and sixty acres to be held and owned in severalty, that when the allotments were selected and approved, the titles should be held in trust for twenty-five years in the manner provided in the allotment act of February 8, 1887 (24 Stat., 1388), and at the end of that period should be "conveyed in fee simple to the allottees or their heirs, free from all incumbrances." The allotments were made and the ceded land was opened to settlement as provided in the act of ratification. Prior to this agreement the company had made no effort to construct any road through these lands formerly occupied by the Cheyenne and Arapahoe Indians as a reservation. The Commissioner of Indian Affairs states that it has not yet filed in his office any maps of definite location of this portion of the road.

If the contention of the company be sustained, it will receive all the benefits of said act and will at the same time be relieved of all obligations imposed upon it.

The Indians occupied these lands under the terms of the treaty of October 28, 1867 (15 Stat., 593), by which it was agreed that no persons except those therein authorized so to do, and agents or employes of the government, should be permitted to pass over, settle upon or reside in the territory set apart for the Indians. It contained the further provision that the Indians would not object to the construction of railroads or other works of utility permitted by the laws of the United States, but this was coupled with the express provision that if any such road should be constructed on the lands of the reservation the government would pay the Indians damages therefor.

The treaty of April 28, 1866 (14 Stat., 769), between the United States and the Choctaw and Chickasaw Indians, in whose country the greater portion of the road contemplated by the act of 1888, *supra*, was to be located, contained a provision granting the right of way for railroads authorized to be constructed, with the provision that full compensation should be made for any property taken or destroyed in the construction of such road.

This company would have had no right to enter the territory of these Indians for the purpose of constructing its road without authority

therefor by an act of Congress. The United States had the right under the treaty with these Indians to authorize the construction of railroads through their country, but the same treaty which recognized this right provided that full compensation should be paid the Indians for any damage to their property, caused by the building of any such road. This was what the acts conferring rights upon this company purported to do, that is, to authorize it to secure a right of way by payment of a just compensation to the Indian occupants of the land subjected to such right of way. The fact that the United States had the right by virtue of the power of eminent domain to authorize the construction of a road through this country and consequently, the taking of a right of way therefor, in the absence of any treaty provisions in respect thereto (Cherokee Nation *v.* Kansas Railway Co., 135 U. S., 641) does not affect the question. One condition upon the exercise of the power of eminent domain is that the land shall not be taken without just compensation to the owner.

The language used is not that of an absolute grant *in presenti* of a right of way. In these acts Congress did not use the phrase, "is hereby granted," that is found in acts granting a right of way and in the general act of March 3, 1875 (18 Stat., 482). This company was authorized to build its road through this Indian country and to acquire the right of way in the manner prescribed, that is, it was authorized to employ the government's power of eminent domain. The legislation in question did not provide for or contemplate the taking of a right of way without just compensation, and therefore this company never at any time had the right to construct its road through these lands without indemnifying the Indian holders for damage inflicted by such construction.

Another question is presented to which it seems proper to direct attention. Until proper steps were taken to exercise the power of eminent domain as provided in said acts this company acquired no right in or to any particular tract of land. Before this was done a radical change had taken place in respect to the title to these lands formerly occupied by the Cheyenne and Arapahoe Indians as a reservation. The Indians had released all their claim, as a tribe, to that country and as individuals had received specific tracts as allotments with a guaranty by the United States of a future conveyance thereof free of all incumbrance whatsoever. The acts in question provided a stated compensation to the tribes for the damage to lands held as tribal property and for full compensation to individuals for damage to lands held under tribal laws and usages, and prescribed a plan for ascertaining the amount of such compensation. The provisions as to compensation were adopted in view of the conditions then existing, but were not framed with any view of the conditions as they now exist. It is clear that Congress did not provide for the company's exercising the power of eminent domain against lands held as these lands are now

held. The company did not exercise the right conferred upon it while the lands were in such a condition that the provisions of the law afforded protection to the holders of the land affected. The plan provided for ascertaining the damages is not practicable under the changed conditions of the title to the land and of the people holding it. These people are now citizens of the United States, and hold their lands under an an assurance from the United States of a future conveyance and not under the usages and customs of any Indian tribe. The law under which this company claims does not make provision for the ascertainment and payment of a just compensation under existing conditions. The power of eminent domain can be exercised only upon the payment of just compensation to the holder of the land affected. It follows then that the laws in question do not confer upon this company any right to subject these lands as now held to a right of way for their road.

Approved, September 17, 1898.

WEBSTER DAVIS,
Acting Secretary.

SWAMP LANDS—INDIAN RESERVATION—ACT OF MARCH 12, 1860.

STATE OF MINNESOTA.

The White Earth Indian reservation established by the treaties of May 7, 1864, and March 19, 1867, was not made in pursuance of any law enacted prior to the act of March 12, 1860, granting swamp lands to the State of Minnesota; hence, lands of the character granted, lying within said reservation are not thereby excluded from the operation of said grant.

Acting Secretary Davis to the Commissioner of the General Land Office,
(W. V. D.) *September 17, 1898.*

Under date of December 27, 1895, your office submitted to the Department a report and recommendation touching the claim of the State of Minnesota to swamp lands in the Red Lake and White Earth reservations, and under dates of February 15th and March 6th, 1896, further reports were submitted in reference to said claim.

March 27, 1896 (22 L. D., 388), the Department rendered a decision adverse to the claim of the State to swamp lands in the Red Lake reservation, without therein passing upon its claim to such lands in the White Earth reservation.

The Department is in receipt of your office letter of April 30, 1898, calling attention to the fact that your office is not able to take any action in reference to opening or offering for sale the lands in the four ceded townships of the White Earth reservation, under the act of January 14, 1889 (25 Stat., 642), because of the pendency before the Department of the State's claim to swamp lands therein.

It is shown by the letter of the Commissioner of Indian Affairs dated June 20, 1894, and by the letter of your office dated March 6, 1896, that

the four townships of the White Earth reservation now in question were unappropriated public lands, free from any Indian claim, at the date of the swamp land grant to Minnesota, March 12, 1860 (12 Stat., 3), and that they were reserved for the benefit of the Indians under the treaties of May 7, 1864 (13 Stat., 693), and March 19, 1867 (16 Stat., 719).

The question arises whether, after the date of the swamp land grant to the State, these lands could be lawfully reserved by the United States and disposed of for the benefit of the Indians, so as to defeat the swamp land grant.

The act of March 12, 1860, extended the provisions of the act of September 28, 1850 (9 Stat., 519), to the States of Minnesota and Oregon, subject to the exceptions contained in the following proviso to the act of 1860.

Provided, That the grant hereby made shall not include any lands which the government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

The State calls attention to various judicial interpretations of the act of September 28, 1850, granting swamp and overflowed lands to the State of Arkansas (9 Stat., 519), in which by the courts and by the Department it has been held that said grant was a present one, and prevented other disposition of lands of this class, after the date of the grant. That such is the construction placed upon said act is conceded, and no discussion of the cases cited by the State seems necessary.

If the act of 1860, notwithstanding its proviso, receives the same construction as the act of 1850, the proviso will be rendered nugatory and of no effect. This would violate well established rules of interpretation, and would defeat the will of Congress as expressed in the proviso.

Construing the act of 1850, and the act of 1860, together as one act of the latter date, it would still be a grant *in presenti* of all swamp lands in the State, excepting those reserved, sold or disposed of by the United States, in pursuance of a law theretofore enacted, prior to confirmation of title under the swamp land grant.

Was the reservation of these four townships made before the confirmation to the State of title under the swamp land grant? The issuance of patent is the final and only act of confirmation of title under the swamp land grant, and as no patent has yet issued for any of these lands it follows that the reservation was made before the title of the State to any of the lands therein was confirmed.

Were these four townships reserved in pursuance of any law enacted prior to the act of 1860? As before stated, they were unappropriated lands at that time and were subsequently reserved by the treaties of 1864 and 1867. Those treaties do not purport to have been made in pursuance of any prior law nor do they purport to have followed any prior law in providing for the reservation of these lands. While

statutes are sometimes enacted providing for or looking toward the negotiation of a treaty, the authority of the President and Senate in negotiating and ratifying treaties is not dependent upon the existence of any such statute, and the treaties when made become effective and of force not by reason of any statute theretofore enacted, but by reason of the action of the President and Senate in adopting them. The act of December 19, 1854 (10 Stat , 598), "to provide for the extinguishment of the title of the Chippewa Indians," etc., in pursuance of which your office suggests that these treaties were negotiated and these lands reserved, did not contemplate the creation of a reservation such as the White Earth reservation. It provided for securing an extinguishment of the Chippewa title to lands in Minnesota and Wisconsin, one of the terms of which extinguishment was to be:

> granting to each head of a family, in fee simple, a reservation of eighty acres of land, to be selected in the territory ceded, ... which said reservations shall be patented by the President of the United States.

This act thus contemplated eighty acre reservations in the nature of individual allotments in fee simple to be patented to the heads of families and held by them in severalty, but it contained no reference to the creation of a reservation of any other character. The treaties of 1864 and 1867 made no provision for small or eighty acre reservations or allotments of ceded lands to be patented and held in severalty, but did provide for a single reservation embracing a large area of land to be held by the Indians as a tribal reservation. Under these circumstances it can not be said that the White Earth reservation, embracing these four townships, was established in pursuance of the act of 1854 or of any other law enacted prior to the swamp land grant to Minnesota. These four townships being unappropriated public lands at the date of that grant were subject to disposal by Congress, and upon the passage of the act of March 12, 1860, the right of the State attached to all the swamp lands therein, subject alone to the exceptions made in the proviso to that act and, as hereinbefore shown, the reservation subsequently made for the benefit of the Indians does not come within those exceptions.

The subsequent act of January 14, 1889 (25 Stat., 642), does not come within the terms of the proviso and can not defeat the prior grant to the State of the swamp lands in these townships, so it follows that the lands in said townships can only be disposed of according to the act of 1889, after eliminating the swamp lands therefrom.

Your office is directed to take the necessary steps to eliminate from the other lands in the townships named such lands as were swamp or overflowed at the date of the swamp land grant to the State of Minnesota, and to that end you will notify the State that its right to such lands is recognized, and a reasonable time will be allowed it to make its selections, subject to the approval of your office, after the expiration of which time your office will proceed to dispose of the residue of the lands in said townships in accordance with the provisions of the act of January 14, 1889.

RIGHT OF WAY FOR IRRIGATION PURPOSES—INDIAN RESERVATION.

RIO VERDE CANAL CO. (ON REVIEW).

The provisions of section 18, act of March 3, 1891, granting the right of way "through the public lands and reservations of the United States" for irrigation purposes include Indian reservations, subject to the condition that the location and construction of the ditch or canal shall not interfere with the proper occupation of such reservations by the government for Indian purposes and uses.

The case of Florida Mesa Ditch Company, 14 L. D., 265, overruled.

Secretary Bliss to the Commissioner of the General Land Office, August 25, 1898.

(W. V. D.) (E. F. B.)

By decision of March 14, 1898 (26 L. D., 381), the Department refused to approve the maps filed with the application of the Rio Verde Canal Company, in the Tucson, Arizona, land district, for right of way for reservoirs, canals and ditches, under sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095), for the reason as stated that said act does not grant a right of way for irrigation purposes through Indian reservations.

The approval having been withheld as to that part of the right of way applied for, passing through the Indian reservation, it was refused as to that portion of the right of way lying below the reservation, for the reason that it could not be utilized, except in connection with a canal or ditch passing through the reservation.

In the decision complained of, the construction given to the 18th section of the act of March 3, 1891, in the case of Florida Mesa Ditch Company, 14 L. D., 265, was adhered to.

The Rio Verde Canal Company has asked that the decision of March 14, 1898, be reviewed, for the reason that the opinion of the Assistant Attorney General for this Department, upon which the decision of the Department in the Florida Mesa Ditch Company's case rested, was controlled by the particular facts pertaining to the reservation then under consideration, which are not applicable to Indian reservations generally.

The opinion referred to was not rendered with reference to the particular facts controlling the reservation then under consideration, but was based upon the broad ground that the reservations referred to in the act were only those reservations actually and directly used by the government, and not reservations set apart for the use of the Indians.

The decision of this case must therefore depend upon whether the words "reservations of the United States," as they occur in the 18th section of the act of March 3, 1891, granting the right of way "through the public lands and reservations of the United States," for the purpose of irrigation, include Indian reservations, and whether such was the purpose of Congress.

An Indian reservation is a reservation of the United States. As

said by the court in Leavenworth, Lawrence and Galveston R. R. Company *v.* United States (92 U. S., 733, 747): "Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference in this respect, whether it be appropriated for Indian or for other purposes." In that case it was contended that the exception in the statute was of lands reserved "to the United States," whereas the lands in controversy were reserved to the Osages, but the court said that "the verbal criticism that these lands were not within the meaning of the proviso reserved 'to the United States' is unsound." "In one sense, they were reserved to the Indians, but, in another and broader sense, to the United States for the use of the Indians."

So, in the Hot Springs cases, 92 U. S., 698, the court said that a reservation of lands for future disposal was a reservation "to the United States."

A grant of a right of way over lands "reserved to the United States" includes reservations set apart for the sole use and occupation of Indian tribes. Missouri, Kansas and Texas Railway Company *v.* Roberts, 152 U. S., 114.

These authorities are cited not only to show that Indian reservations are reservations of the United States—whether considered in a general or technical sense—but to show that the government, in setting them apart for the use and occupation of the Indians, whether in pursuance of a treaty or otherwise, did not surrender any of its sovereign rights and powers, and that the granting of the right of way over such territory is but the exercise of the right of eminent domain, which is not in violation of any treaty made with the Indians or of its obligation to reserve the lands for their sole use and benefit, free from intrusion by others. See also Cherokee Nation *v.* Southern Kansas Ry. Co., 135 U. S., 641.

General terms and expressions are to be given their full and general significance, and are to be so understood, unless restrained by the context or by some admissible consideration drawn from the subject matter of the enactment and its general scope and purpose. Black on Interpretation, 136.

As the words "reservations of the United States" is a general term or expression, including all reservations made by the United States for any purpose whatever, it must be accorded that significance, unless restrained by the words of the statute, or unless it is apparent from the general scope and purpose of the act that it was to be used in a more limited sense.

In the opinion cited in support of the decision of March 14, 1898, the proviso to the 18th section of the act of March 3, 1891, "that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation," was considered as a limitation restraining the operation of the general term, indicating that it should embrace within its meaning only such reservations as are actually and directly used by the government.

It was also argued that as Congress had by treaty set apart that reservation for the absolute, undisturbed use and occupation of the Indians, with the assurance that no person, except the Indians for whose use the reservation was created, and the officers, agents and employes of the government should be permitted to enter upon it, it could not allow any one to enter upon said reservation for the purpose of constructing canals and ditches, without violating the provisions of the treaty and annulling its solemn obligations, and such construction should not be given to the law, unless the intention of Congress to annul its agreement was so clearly expressed and unmistakably set forth that no other conclusion could be reached without doing violence to the language used.

Upon a more careful consideration of this opinion, the conclusions therein reached do not seem to follow as the logical result of the reasoning advanced, either as demonstrating that the language of the proviso defines and limits the term "reservations of the United States," or that the grant of a right of way through such reservations would be in violation of the rights secured to the Indians by treaties. There is nothing in the proviso to restrain the operation of the general term, or to indicate that the reservations had in view were only those reservations that are actually and directly used by the government, for the reason that all reservations are set apart for the use of the government, whether they be appropriated for Indian or other purposes.

The "proper occupation by the government" of an Indian reservation is the occupancy of it by the Indians for their special use, and any occupancy or use of such reservation otherwise, that would interfere with the free use and enjoyment of the reservation by the Indians would be a diversion from the uses intended, and is expressly prohibited by the proviso, which is as applicable to an Indian reservation as to any other reservation set apart for the uses of the United States.

A military reservation is set apart for the uses of the army, and can not be diverted from such use so long as the reservation continues, but the act of March 3, 1891, authorizes the construction of canals and ditches across such reservation for the purpose of irrigation, if they can be so located as not to interfere with the proper occupation of such reservation by the United States, which merely means that the construction of the canal or ditch will not interfere with the uses for which the reservation was created, and this applies to all reservations.

The sole office of the proviso was to expressly prohibit the use or occupancy of any reservation in such manner as to interfere with the proper occupancy and use of it by the government, and as the maps of location are subject to the approval of the department having jurisdiction of such reservation, the privilege granted can be so controlled as to carry out the purpose of the act in the construction of irrigation works, without diverting the reservations from the uses for which they were intended.

If the route of a canal through an Indian reservation can be so located

as not to interfere with the free use and enjoyment of such reservation by the Indians, there is no reason apparent why such reservation should not be subject to the grant of the right of way as any other reservation, and the executive department having jurisdiction of such reservation will determine whether it can be so located, and will withhold or give its approval accordingly.

It does not follow that any provision of the treaty would be annulled or the obligation of the government violated by the granting of a right of way through such reservations. As a general rule, in treaties with the Indians, establishing reservations, it is stipulated that they shall be set apart for the absolute and undisturbed use and occupation of the Indians, and that no person, except those authorized by the treaty, shall be permitted to pass over, enter upon or reside on such reservations. It is also generally agreed that whenever, in the opinion of the President, the public interests may require it, all roads, highways and railroads authorized by law shall have the right of way through the reservations, but the authority of the government to exercise not only the right of eminent domain, but full control and ownership over such reservation, is not derived from such stipulation. It is a right inherent in the government by virtue of its sovereignty to authorize the construction of roads and highways through such reservations, although they have been reserved by treaty for the undisturbed use and occupancy of the Indians, and the exercise of such right is not the violation of any treaty provision. Cherokee Nation *v.* Kansas Ry. Co., 135 U. S., 641; Missouri, Kansas and Texas Ry. Co. *v.* Roberts, 152 U. S., 114.

An Indian treaty, however, when in conflict with a subsequent law of Congress, must yield thereto, and is to the extent of the conflict repealed (Cherokee Tobacco case, 11 Wal., 616, 620), so that the matter is not to be determined by reference to Indian treaties alone.

We not only fail to gather from the language of the statute, or from a consideration of the obligation of the government to the Indians, any purpose or reason for excluding these reservations from the operation of the statute, but when it is considered with reference to its general scope and the object to be attained, it is manifest that the purpose of Congress was to grant the right of way through all the public lands and reservations over which it exercised sovereignty, ownership or control, limited only by the condition that such right of way should be so located as not to interfere with the proper occupation by the government of any such reservation.

The scope and purpose of the act are indicated by the regulations of the Department for carrying into effect the provisions of the act, in which it is said:

> These acts are evidently designed to encourage the much-needed work of constructing ditches, canals, and reservoirs in the arid portion of the country, by granting right of way over the public lands necessary to the maintenance and use of the same.

This legislation was the result of an extensive investigation by Congress as to the best mode of reclaiming the lands in the arid region,

either through individual effort, or under the control of the government. The much-needed work was, however, to be accomplished through private agencies, and to encourage the construction of reservoirs, canals and ditches in the arid portion of the country Congress granted the right of way through the public lands and reservations to any canal or ditch company formed for the purpose of irrigation, or to any individual or association of individuals for the purpose of constructing and maintaining irrigation works.

If the interpretation heretofore given to this statute must prevail, the intervening of an Indian reservation between the source of water supply and the lands to be irrigated would defeat the very object which the act was designed to encourage, even though the location and construction of the ditch or canal across such Indian reservation would not interfere with the proper occupation of such reservation by the government for Indian purposes and uses.

For the reasons stated herein the case of Florida Mesa Ditch Co. (14 L. D., 265), is overruled, the motion for review in the case at bar is granted, and the decision of March 14, 1898 (26 L. D., 381), is vacated. As the decision of your office herein was based upon the prior decision in the Florida Mesa Ditch Co., case, here overruled, the papers are returned to your office for examination and action thereon in view of the ruling herein made.

KEZAR *v.* HORDE.

Motion for review of departmental decision of July 8, 1898, 27 L. D., 148, denied by Acting Secretary Ryan September 20, 1898.

PRACTICE HEARING BEFORE LOCAL OFFICE.

DEIHL *v.* CLACK.

The fact that neither of the local officers is present while the witnesses are testifying in a hearing had before them, does not affect the regularity of such proceedings, where there is no vacancy at such time in the office of either register or receiver, and the witnesses are sworn by one of said officers and both of them subsequently examine the testimony and render joint decision thereon.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 20, 1898.* (C. J. W.)

John W. Clack made homestead entry for the NE. ¼ of Sec. 20, T. 22 N., R. 3 W., at Enid, Oklahoma, on October 5, 1893.

On December 15, 1893, Henry C. Deihl filed affidavit of contest against said entry, alleging prior settlement.

A hearing was had, and on January 9, 1896, the local officers rendered a decision in which they found Clack to be the prior settler and recommended the dismissal of the contest.

September 16, 1896, your office affirmed the decision of the local officers. Deihl appealed, and on July 11, 1898, your office decision was affirmed by the Department (not reported).

The plaintiff has filed a motion for review of said last named decision, based, substantially, on his former contentions, which were considered before the decision complained of was rendered. The propositions on which he has been heard, and which were considered when the case was before the Department on appeal, will not be now considered, in the absence of apparent error in the conclusions reached. It is insisted that your office gave undue weight to the opinion of the local officers as to the facts, and that the Department allowed greater weight to the concurring opinions of your office and the local office than they were entitled to.

That each of the opinions so far rendered has been based upon separate and independent examinations of the record is apparent. In reference to the facts found by the local officers, it is stated in your office decision that: "After a careful examination of the testimony, I am of the opinion that your decision fairly, correctly and succinctly states the facts." This would indicate that the evidence as it appears in the record was itself the basis of your opinion.

In the departmental decision complained of it is said, in reference to the decision of the local officers:

> It is not probable that their opportunities for judging of the truthfulness of the witnesses who testified were greatly superior to those of your office, and they doubtless made up their opinion chiefly from the record.

This was said in view of the fact that neither of these officers was present in the contest room when the witnesses were testifying, though one of them was present in the building and supervised the hearing.

The conclusion reached by the Department, although an affirmance of your office and the local office, was not reached without a careful examination of the record, and it is upon the evidence in the record that the opinion rests.

The plaintiff files an affidavit with his motion, in which he alleges that he protested against the hearing proceeding without the personal presence in the room of either the register or receiver, and it is insisted, as matter of law by his counsel, that the hearing could not lawfully proceed without the personal presence of both officers.

This question is raised for the first time in the case, and demands consideration.

If the office of either register or receiver had been vacant at the time of the hearing, there can be no doubt but, under the authority of the case of Graham *v.* Carpenter (9 L. D., 365), the hearing would have been illegal, but, in the case under consideration, both offices were filled. The hearing was ordered by your office, and after the testimony was taken the register and receiver rendered a joint decision, based on the testimony reduced to writing at the time it was given before one of them.

The case therefore falls within the principle decided in the cases of Potter *v.* the United States (107 U. S., 126,) and Lytle *v.* Arkansas (9 How., 314), where one of these officers may discharge the duties of both in intermediary proceedings. In the case at bar, the record shows that the witnesses who were examined at the hearing were first sworn by the receiver, and after the testimony was written out each one signed his testimony in the presence of the receiver, who attested it officially (except the witness M. C. Hart).

Subsequently, the register and receiver examined this written testimony and joined in a decision based upon it. This was a substantial compliance with the law, and the hearing was before the register and receiver within the meaning of the law.

As to the witness Hart, who omitted to sign his testimony before the receiver, the parties joined in a stipulated agreement, that his testimony as it appears in the record is correct and all objections to it are waived. This stipulation is a sufficient answer to the objection now raised to the testimony for the first time. No such objection is noted anywhere in the record, nor was the question raised in the appeal of plaintiff to your office. On the contrary, both in his appeal to your office and his appeal from your office to the Department he relied upon and cited the evidence as contained in the record.

The case has been fairly considered and disposed of under that record, and no valid reason appears for disturbing the conclusion reached. The motion is accordingly denied.

Scanlon *v.* New Orleans Pacific Ry. Co.

Motion for review of departmental decision of July 22, 1898, 27 L. D., 274, denied by Acting Secretary Ryan September 20, 1898.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

Hastings and Dakota Ry. Co. *v.* Grinden (on Review).

An indemnity selection of an entire section in lieu of a specified section designated as a whole, may, under the directory authority of the Secretary of the Interior in the matter of indemnity selections, be accepted as based on a sufficient specification of loss, where the entire section so specified is in fact lost to the grant, and no danger exists of an enlargement of the grant through the acceptance of such selection.

Acting Secretary Ryan to the Commissioner of the General Land Office.

(W. V. D.) *September 20, 1898.* (F. W. C.)

With your office letter of August 23, 1898, was transmitted a motion, filed on behalf of Carrie C. Grinden, for review of departmental decision of July 5, 1898 (27 L. D., 137), holding that the showing submitted in support of her application to make homestead entry covering the

E. ½ of the NE. ¼, Sec. 17, T. 119 N., R. 40 W., Marshall land district, Minnesota, did not evidence such a claim to the land on October 29, 1891, the date the Hastings and Dakota Railway Company made selection thereof on account of its grant,

as would bar its selection on account of the grant; and her application will stand rejected and the company's selection, if otherwise regular and proper, will be submitted for approval.

As presented on appeal, Grinden depended upon her alleged claim to the land at the date of selection to defeat said selection.

The regularity of said selection was not questioned and the decision quoted from did not attempt to pass thereon.

The motion now before me urges—

that irrespective of any question whether she had acquired a right to the land prior to the attempted selection of October 29, 1891, she may be entitled to enter the tract, and that it was error not to have included in the issues to be tried the following:

1. Was the selection for railway purposes made October 29, 1891, a valid one, fully complying with the rules and regulations of the Department governing railway indemnity selections?

2. Was said selection, as it appeared of record at the date of the presentation of Grinden's application, and as it still appears, such an appropriation of the land as to bar the admission of her entry?

This motion is based upon the ground of failure to consider the questions just stated, and it is hereby contended that it is shown by the records of the General Land Office that said selection was not made in accordance with the departmental requirements existing at its date, and that the same has not been perfected, although the claimant under the grant was duly notified, in accordance with the regulation prescribed by the Secretary of the Interior in his decision of the case of LaBar *v.* Northern Pacific Railroad Company (17 L. D., 406), and that, in considering and determining the rights of said claimant and this petitioner, the Department was bound to take notice of the record facts in the case.

The record facts in the case for consideration of the Department are those disclosed by the record as transmitted, including the Commissioner's decision. If the record thus made is not complete, attention should be called thereto in the appeal, and in the absence of objection by appellant, this Department is warranted in acting upon the record as presented. There was therefore no error committed in deciding the case upon the record as transmitted upon the appeal.

The motion might for this reason be denied, but as the question raised affects many other tracts, in order to facilitate the adjustment of the grant at the earliest possible date, as commanded by the act of March 3, 1887 (24 Stat., 556), the objection to the list filed by the company October 29, 1891, will be considered.

Referring to the specific selection including the tract in question, the motion states:

The list of selections (Marshall List No. 1) filed October 29, 1891, in so far as relates to the land here in controversy, is as follows:

"S. Tp. R. S. Tp. R.

"All of 17, 119, 40, in lieu of all of 35, 114, 28."

The tract book of the General Land Office relating to section 35, township 114,

range 28, shows the several parts of said section to have been disposed of under various laws as follows:

NE.¼ NE.¼, located Sept. 1, 1857, by Francis Drake, per military bounty land warrant No. 58979;

N.½ NW.¼ & NW.¼ NE.¼, located Sept. 2, 1857, by George Kew, per M. B. W. No. 60048;

S.½ NE.¼, SE.¼, SE.¼ NW.¼ & E.½ SW.¼, approved Aug. 26, 1864, as indemnity for Southern Minnesota (now St. Paul and Sioux City) railway grant;

SW.¼ NW.¼ & NW.¼ SW.¼, located June 20, 1857, by Patrick Swaney, per M. B. W. No. 15043;

SW.¼ SW.¼, located Sept. 12, 1857, by Patrick Barry, per M. B. W. No. 70114.

This land is geographically within the primary (ten miles) limits of the Hastings and Dakota railway grant made by act of July 4, 1866 (14 Stat., 87), and was lost to said railway company by reason of the disposals above mentioned.

Those disposals constitute five separate and distinct losses and under decisions and instructions rendered and made prior to October 29, 1891, it was incumbent upon the claimant under the railway grant, in order to establish a right to select indemnity, to separately specify each particular loss, and make five separate and distinct selections to cover the whole. That is to say that the selections of indemnity and the several losses forming the bases therefor should have been specified tract for tract.

Circular of August 4, 1885, 4 L. D., 90;

Northern Pacific Railroad Company *v.* John O. Miller, 11 L. D., 428;

St. Paul and Northern Pacific Railroad Company *v.* St. Paul, Minneapolis and Manitoba Railway Company, 13 L. D., 349 and 353.

The motion does not question that the several tracts set forth in the last column were actually lost to the grant. If they were all lost and are otherwise a proper basis, there is really no good ground to be urged against the inclusion of them all, being in one section, in a single loss. The only purpose of requiring the separation of the losses is that in event one should turn out to be faulty it would be impossible to fix the portion of the selection corresponding thereto.

Without questioning the correctness of the principle announced in the cases referred to, which are the proper guides for the preparation of indemnity selection lists, it is sufficient to state that—

Indemnity selections are made under the direction of the Secretary of the Interior, and the enforcement of any requirement in the matter of a specification of a loss is only for his information, and as a bar to the enlargement of the grant, and may be waived whenever he deems such course advisable. (Syllabus: William Hickey, 26 L. D., 621.)

In the matter of the adjustment of the grant for this company, the Department, after the decision in the case of LaBar *v.* Northern Pacific Railroad Company (*supra*), in the consideration of this very list of October 29, 1891, recognized the fact that the grant for this company is largely deficient and relieved the company from the necessities of complying with the circular of August 4, 1885 (4 L. D., 90), holding that—

The provision in the departmental circular of August 4, 1885, directing that where indemnity selections had been theretofore made, without specification of losses, the company should be required to designate the deficiencies for which such indemnity is to be applied, before further selections are allowed, is not applicable where the grant is deficient in quantity, and the danger of duplication of losses does not exist. (Hastings and Dakota Railway Co., on review, 19 L. D., 30: syllabus.)

Under these circumstances the objections to the list of October 29, 1891, made in the motion under consideration, need not be further considered, and said motion is accordingly denied and herewith returned for the files of your office.

RIGHT OF WAY—RESERVATION IN PATENT.

OREGON SHORT LINE RY. CO. *v.* HARKNESS.

A reservation of a right of way acquired under a special act may properly be incorporated in a final certificate or patent issued for land traversed by said right of way; but no such reservation is required in case of a right of way acquired under the general act of March 3, 1875.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 20, 1898.* (F. W. C.)

The Oregon Short Line Railway Company has appealed from your office decision of January 13, 1898, holding that the following notation made by the local officers upon the final certificate of Henry O. Harkness issued on his homestead entry made March 4, 1897, covering the SE. ¼ of the NW. ¼ and Lots 1, 4, 5 and 6, Sec. 12, T. 9 S., R. 36 E., Blackfoot land district, Idaho, should be canceled, namely: "Subject to right of way O. S. L. and U. and N. Railways."

The tract above described is within the limits of the reservation made by executive order of June 14, 1867, and specially set apart by executive order of July 30, 1869, and designated as the reservation for the Bannock Indians, in accordance with the second article of the treaty of July 3, 1868, with the eastern band of Shoshonees and the Bannock tribe of Indians (15 Stat., 673).

By the act of July 3, 1882 (22 Stat., 148), an agreement made on behalf of the United States with the Shoshonee and Bannock Indians resident on Fort Hall Indian reservation in the Territory of Idaho, was accepted and ratified and provision made for carrying the same into effect. Under this agreement a right of way for the proposed line of the Utah and Northern Railroad through said reservation from east to west was ceded to the United States and by the United States granted to said Utah and Northern Railroad Company, upon certain conditions, among which was the payment by the company into the Treasury of the United States of $6000 for said Indians.

The right of way thus purchased traverses the land now embraced in Harkness' entry, and the Oregon Short line is the present successor of the Utah and Northern Railroad Company.

In accordance with an agreement made with said Indians, which was accepted and ratified by the act of February 23, 1889 (25 Stat., 678), the Indians ceded to the United States a tract of land described in the second article of said agreement, which according to its terms was to include "such quantity on the north side of Port Neuf River as H. O.

Harkness may be entitled to under existing law, the same to be conformed to the public surveys, so as to include the improvements of said Harkness."

On March 4, 1897, Harkness made homestead entry of the above-described land, and in an affidavit filed in support thereof alleged that he had resided upon, cultivated and improved the lands covered by his application continuously since the year 1870.

A map of location was filed by the Oregon Short Line and Utah Northern Railroad Company, under the provisions of the act of March 3, 1875 (18 Stat., 482), and approved by this Department January 18, 1897, which also traverses a portion of the land included in Harkness' entry and there forms a connection with the line located and constructed under the act of 1882.

In your office decision it is stated—

> The company claims that under the grant of right of way made to its predecessor under the act of July 3, 1882 (22 Stat., 148), it was vested with right of way over the tract by virtue of the construction of its road. The company claims also that the approval, January 18, 1897, under the act of March 3, 1875 (18 Stat., 482), of its map showing the location of its line across said tract prior to the date of Harkness' entry, entitles it to have the notation on said entry remain and be incorporated in the patent which may be issued thereon.

The only question at issue is as to whether there should be a reservation incorporated in the final certificate or patent on Harkness' entry, of the right of way on account of the grants made by the acts of July 3, 1882, and March 3, 1875, *supra*.

Following the circular of November 27, 1896 (23 L. D., 458), there is no need of incorporating in the final certificate or patent a reservation of the right of way acquired under the act of 1875, but the right of way obtained under the act of 1882 should be included in an appropriate reservation for the reason that the act of 1882 is a special one. There is room for a difference of opinion respecting the merits of the distinction made by this circular, but while it remains in force it should be followed.

The road has been actually constructed along the right of way provided for in the act of 1882. According to the showing made in this case, Harkness went upon this land after the Indian reservation had been created and the initiation of his claim could not therefore antedate the cession ratified and accepted by the act of February 23, 1889, under which the land embraced in his entry was ceded to the United States. Prior to this time, in accordance with the agreement ratified and accepted by the act of 1882, the Utah and Northern had purchased and become possessed of a right of way across this land. It is clear, therefore, that Harkness' entry is subject to the right of way thus secured, and to that extent a reservation should be incorporated in his patent.

With this modification, your office decision is affirmed.

PRACTICE—SERVICE OF NOTICE—MINOR HEIRS.

LEMERT *v.* MCMILLAN'S HEIRS.

Compliance with the requirements of Rule 9 of Practice must be affirmatively shown to confer jurisdiction under proceedings that require service of notice upon minor heirs.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 20, 1898.* (C. J. G.)

April 26, 1888, Marguerite C. McMillan, for herself and other heirs of Thomas G. McMillan, deceased, made timber culture entry for the NE. ¼ and lots 5, 6 and 7, Sec. 18, T. 24 S., R. 33 W., Dodge City land district, Kansas.

Thomas G. McMillan had been awarded proference right in a contest against an entry of this land.

June 24, 1893, Beverly W. Lemert filed affidavit of contest against the entry described, but as a contest of one Benjamin Davis was then pending against said entry, action on Lemert's contest was suspended to await the result of that of Davis.

January 25, 1895, your office closed the case of Davis *v.* McMillan *et al.*, Davis' contest being dismissed and McMillan's entry being allowed to remain intact.

July 22, 1895, Lemert's contest was refiled, it being alleged in substance that neither Marguerite C. McMillan nor any one else has ever plowed or planted any portion of said land as required by law; that on June 18, 1892, the said McMillan, for herself and other heirs of Thomas G. McMillan, offered evidence in the land office at Garden City, Kansas, in support of an application to commute; and that at date of said entry there was a natural growth of timber on the land.

August 13, 1895, Lemert filed a supplemental affidavit, duly corroborated, setting forth more specifically the charge of failure to plant and cultivate the land to trees.

On the last named date the local office issued notice for a hearing to be had October 25, 1895. This notice was practically in the same language as the affidavit of contest, and bears evidence of having been personally served on Marguerite C. McMillan and other heirs of Thomas G. McMillan, deceased, at Jacksonville, Illinois, September 3, 1895.

September 20, 1895, the local office notified Lemert that this entry had been contested several times prior to the initiation of his contest, and that

> as the allegations in your complaint are rather general in character and some of them have been adjudicated, your case is hereby held for dismissal and you are allowed thirty days in which to file an amended affidavit, corroborated, setting forth specifically the exact defaults that have occurred and giving the exact year or years during which they have occurred.

September 21, 1895, Lemert filed an amended affidavit in which it was set forth that Marguerite C. McMillan "has remarried and her name is now Marguerite C. Morris, and the names of all of the other heirs of Thomas G. McMillan, deceased, and who are his surviving children, are Sarah E. McMillan, Mary G. McMillan and William C. McMillan." The default as to planting and cultivating trees was reiterated with more particularity, and it was alleged that such default then existed. Attached to this affidavit was a notice to Marguerite C. Morris and other heirs named in the affidavit, notifying them that on September 20, 1895, Lemert would ask leave to file an amended affidavit of contest, and setting forth what would be alleged in said amended affidavit. This notice was personally served on each of the parties named therein, in the State of Illinois.

October 18, 1895, Lemert filed an amended affidavit in which he set forth at considerable length the allegations he had before made, the defaults being charged with particularity, from year to year, and the affidavit was in other respects more specific.

October 25, 1895, Lemert filed a statement to the effect

that the defendants Mary G. McMillan, Sarah E. McMillan and William C. McMillan, above named, are all minors, but their exact age is not known to plaintiff, that each of said minors and their mother have been duly served with notice by personal service, of the pendency of this suit, and that neither of them, nor has any one for them, made application for the appointment of a guardian *ad litem* for said minors in this suit. Therefore plaintiff asks that the register and receiver appoint some suitable person the guardian of said minor defendants for this suit.

The local office, in compliance with this request of Lemert, appointed one John Harper guardian *ad litem* for the said minor defendants. Harper filed an acceptance of the appointment, also filed a general denial of all of Lemert's allegations, and the case proceeded to trial.

November 8, 1895, upon the testimony introduced by him, the local office rendered decision in favor of contestant, and recommended cancellation of the entry. Each of the parties defendant and John Harper were notified of this decision.

December 12, 1895, the attorney claiming to represent defendants filed a motion for rehearing, containing fourteen specifications of error. Plaintiff was notified that this motion would be presented to the local office December 21, 1895, on which date the plaintiff appeared, but neither the defendants nor their attorney appeared, the latter merely filing an argument in support of the motion.

Plaintiff moved to dismiss the defendants' motion for rehearing, which was overruled by the local office. Plaintiff then asked that the record be forwarded to your office, which was also denied. Thereupon plaintiff filed a written argument in support of his motion to dismiss, and on January 7, 1896, the local office rendered decision refusing to grant the defendants' motion for rehearing.

January 24, 1896, the attorney appealed to your office, where, under

date of December 10, 1896, the actions of the local office were affirmed. In your said office decision the numerous grounds of error assigned by defendants are discussed as follows:

I do not think that either this or your office is without jurisdiction to proceed in this case. While your action in appointing a guardian *ad litem* is a novel procedure, and so far as I am advised wholly without authority, and therefore without effect, and while the defendants were not notified of the amended affidavit filed October 18, 1895, yet in my opinion the affidavit filed July 22, 1895, while general in terms was sufficient upon which to base a hearing. It is not necessary in alleging a default to state that it existed during certain years or periods of time, if by a general statement these years, or periods of time, are necessarily included within the time in which default is charged.

Nor is it material that the issue as to the growth of natural forest trees was determined in defendant's favor in the case of Davis *vs.* McMillan Heirs; the charge is not now relied on by plaintiff. It is also true that Davis charged failure to comply with the timber culture law, and that issue was also determined in favor of the heirs. The testimony taken in Davis' case was adduced in June, 1892. It is therefore obvious that while a charge of failure to plant and cultivate, covering the period from the date of entry until June, 1892, would not be enquired into, as the issue had been once tried and decided in favor of the defendants, that a charge filed July 22, 1895, charging failure to comply with the law from the date of entry to such date of contest, would be investigated for the reason that while a successful plea might be made to the investigation of the charge relating to alleged failure to comply with the law between the date of the entry and June, 1892, no such plea could be made to such part of the charge as alleged default, between June, 1892, and June, 1893, which was, by supplemental affidavit, filed on the day contest notice issued, brought down to August 13, 1895.

Having determined that the affidavits of contest filed July 24, 1895, and August 13, 1895, constitute a good cause of action, it is obviously immaterial whether or not the defendants were notified of the filing of the amended affidavit, which merely set forth more specifically the original charge. It therefore becomes necessary to determine whether or not the service of contest notice is sufficient.

It is shown that personal service was obtained on Mrs. Morris, formerly Mrs. McMillan, and that each of the other defendants were personally served with a copy of said notice. Now the plaintiff has shown that Mary G. McMillan, Sarah E. McMillan and William G. McMillan are minors, whose ages are to him unknown. Amended rule of practice 9, provides that in case the contest is against the heirs of the deceased entryman, notice must be served on each heir, and that if the party to be served be over the age of fourteen years, service shall consist in delivering to him a copy of the notice, and if the party to be served is under the age of fourteen years, such service shall be made by delivering a copy of such notice to the statutory guardian, or if there be none, the person having such person in charge. Now the plaintiff serves this notice on each of the parties and alleges that he does not know their exact ages. One of the parties served was Mrs. Morris, who, acting for the heirs of Thos. G. McMillan, made this entry for herself and the other heirs of Thos. G. McMillan. The plaintiff therefore has served such heirs, including the heir who, acting for the minor heirs, made the entry. The notice mentioned by name each of the parties defendant. I think therefore, in the absence of the showing (which claim is not made by the defendants) that the heirs. William C., Sarah E. and Mary G. McMillan are each or either of them, under the age of fourteen years, and that Mrs. Morris, who acted in their behalf in making such entry, is not the statutory guardian or person having such minor defendants in charge, that the proof of service is sufficient.

If therefore the service of contest notice was regular and the notice was based on a good and sufficient affidavit of contest, no good reason is shown why such notice

was disregarded by the defendants, and you did not err in refusing to reopen the case. From your finding of fact, in which I concur, and from the statement of the testimony hereinbefore cited, it is seen that the defendants were in default, and that entry should not be allowed to remain of record.

The Department does not concur in that portion of your said office decision holding that the proof of service upon the minor heirs of Thomas G. McMillan is sufficient, and that therefore the local office and your office had jurisdiction to proceed with the case. The conclusion of your office is reached by a negative process of reasoning, namely, that in the absence of a showing by the defendants that Mrs. Morris is not the statutory guardian of the minor heirs of Thomas G. McMillan, deceased, therefore it is to be presumed she was acting in that capacity. It was not incumbent upon the defendants to make any such showing. Service of notice must be affirmatively shown by the contestant, and "service upon an alleged guardian will not confer jurisdiction over a minor, if the fact of guardianship is not established." Burgess *v.* Pope's Heirs (9 L. D., 218, syllabus). It can not be presumed that Mrs. Morris is the statutory guardian of these minor heirs. It is not shown that said heirs are over fourteen years of age, or that Mrs. Morris had them in charge in contemplation of Rule of Practice No. 9. In this view the local office was without jurisdiction to proceed with the hearing and your office without jurisdiction to decide the case on the testimony submitted at said hearing, in the absence of evidence of proper notice.

The decision appealed from is accordingly vacated, and the case remanded to your office for such action as may be deemed appropriate.

RAILROAD GRANT INDEMNITY SELECTION SETTLEMENT RIGHT.

MOONEY *v.* CENTRAL PACIFIC R. R. CO.

While the company's right to land within the indemnity limits is determined as of its status at the date of selection, yet an adverse adjudication as to the company's right in such limits will not prevent a subsequent assertion of right on behalf of the company if the land thereafter becomes subject to selection.

The occupancy and improvement of land within indemnity limits by one who is not asserting any right thereto adverse to the company, but is expecting to secure title through the company, is no bar to selection.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *September 23, 1898.* (F. W. C.)

The Central Pacific Railroad Company, as successor to the California and Oregon Railroad Company, has appealed from your office decision of October 15, 1896, holding its claimed right to the SE. ¼ of the NW. ¼, Sec. 1, T. 19 N., R. 5 E., M. D. M., Marysville land district, California, to be concluded by a previous decision of your office, with a view to the allowance of the homestead application of Thomas Mooney covering said tract.

This tract is within the indemnity limits of the grant made by the act of July 25, 1866 (14 Stat., 239), and was included in the company's list of selections, No. 1, filed January 1, 1872. At the time of the government survey, in 1867, this tract was not returned as mineral, but the township was subsequently suspended on account of supposed mineral.

Upon the application of the company a hearing was ordered to determine the character of the lands in said section 1, together with other odd-numbered sections in said township, and upon the evidence adduced, your office decision of June 11, 1880, held that the N. ½ of Sec. 1, all of Sec. 3, and the NE. ¼ of Sec. 11, of said township, were mineral in character.

From this holding the company does not appear to have appealed, but the company's selection as to the N. ½ of said Sec. 1 was never ordered canceled upon the record.

It is stated in your office decision that following the decision of June 11, 1880, the Central Pacific Railroad Company selected other lands in lieu of the N. ½ of said Sec. 1. This is evidently a mistake, as the tract, being within the indemnity limits, would not support a selection of another tract in lieu of its loss to the grant.

It is learned upon inquiry at your office, that on May 26, 1894, the railroad company filed, in compliance with the departmental requirement made in the case of La Bar *v.* Northern Pacific Railroad Co., 17 L. D., 406, a re-arrangement of said list No. 1, showing a specific loss as a basis for the selection of the said N. ½ of Sec. 1, T. 19 N., R. 5 E.

The present controversy arose upon the application tendered by Thomas Mooney on April 21, 1896, to make homestead entry of the SE. ¼ of the NW. ¼ of said section 1, being the tract here in dispute.

Upon said application hearing was ordered by the local officers, after due notice to the railroad company. The evidence adduced shows that this land has been occupied by two persons ever since 1870; as to which was the prior occupant, the record does not disclose.

Mrs. Klos owns a house, fifty-four by fifty-four feet and three stories high, a barn, stable, and other improvements, valued at $3,000, and she claims to have resided upon this land since 1870. She intervened at the hearing, exhibiting a deed from the railroad company made to her in 1896, just prior to the tender of the application by Mooney.

Mooney has a house upon the land, with an acre or two enclosed, which constitute his improvements upon the tract. He seems also to have resided upon the land since 1870.

Mrs. Klos, although claiming under a deed from the railroad company, sought to establish the character of the land to be mineral; but after considering the entire showing, your office decision found and adjudged the land to be as a present fact non-mineral in character.

While it appears that there has been prospecting for a number of years upon the tract, yet upon the showing made in this case the find-

ing made by your office that the tract is non-mineral in character, appears to be clearly warranted.

The tract being found to be non-mineral in character upon the record made in this case, it is unnecessary to consider the effect of the previous adjudication by your office decision of June 11, 1880, in which the N ½ of said section one was held to be mineral in character.

The land was not disposed of under said decision, nor is anyone laying claim to the land based thereon.

That the tract in question is not mineral in character is demonstrated by the record in the case now before the Department.

The company's selection of 1872 was not ordered canceled as the result of your office decision holding this tract to be mineral in character, but by its action in filing the re-arranged list, in 1894, the same must be held to amount to the initiation of a new claim to the tract.

The land being within the indemnity limits, the company's right thereto is determined as of its status at the date of the selection; and a previous adjudication adverse to the company in such limits, would not prevent the subsequent assertion of claim, the land thereafter becoming subject to the company's right of selection.

The lands within the indemnity limits of the grant for this company, were withdrawn in 1867, upon the map of location filed during that year.

In the case of Central Pacific Railroad Co. *v.* Engram, 7 L. D., 240, it was held that any withdrawal beyond the granted limits of the grant made by the act of July 25, 1866, *supra*, was unauthorized.

A large part of the testimony introduced at the hearing upon Mooney's application was directed towards the question as to the status of this land in 1867, when it was sought to be shown that this tract was occupied and claimed by Harry W. Wilson.

Wilson occupied this land at different periods from the spring of 1867 to 1870, when he was succeeded by Mooney, the present applicant.

The land having been found to be non-mineral in character, as before stated, it is but necessary, in determining the company's claim under its selection made as before described, to inquire as to whether there was such a claim to the land at the date of the tender of its selection as would bar the acceptance and approval of the same.

Whether the company's selection be considered as of the date originally presented, January 1, 1872, or the date of the filing of the re-arranged list, May 26, 1894, is immaterial, as the status of the land as regards any conflicting claims thereto appears to have been the same on both dates. At both of said dates the tract appears to have been in the occupation and possession of Mrs. Klos and Thomas Mooney, the present applicant. During the period of twenty-six years prior to the tender of the application of Thomas Mooney neither party appears to have sought to make entry of the land or otherwise to assert a claim thereto adverse to the company.

In explanation of Mooney's act in tendering the application upon which the present controversy arose, his attorney, in a brief filed in support of his claim, states as follows:

In applying for this homestead, Mr. Mooney has no thought or desire to do any wrong to Klos, and was unwillingly forced to apply for it by the acts of Klos himself, who, though his buildings are not believed to be on this tract, clandestinely went to the R. R. office and bought a quit-claim title to it from the R. R. Co. and then came home and told Mooney that the railroad had obtained title to the land, and that he had a warranty deed from it, and served written notice on Mooney to forthwith vacate his little home. Mr. Mooney much frightened, sought counsel and was informed of the true situation, and also advised, as the best and cheapest course, he being poor and ill able to litigate, to go and see Klos and tell him that he, Mooney, would assist Klos and the R. R. Co. to disprove the mineral and pay his equitable share of all expense, including the cost of the land, if Klos would give him a written agreement to convey to him the little home he had lived in so long. But Klos, thinking he had the advantage of the old man, spurned him and his offer; consequently, Mr. Mooney was forced to the steps he took, in order to save his own home. This is the naked truth of the whole matter.

It would thus appear that neither Mrs. Klos nor Mr. Mooney was, at the date of the company's selection, asserting any claim to this land adverse to the claim of the company under its selection: but rather that they looked to the company for title.

While it is to be regretted that in making disposition of the tract the company did not equitably apportion it between the occupants, respecting their claims thereto as previously recognized through such a long period of years, yet upon the record before me it must be held that no such showing has been made as would warrant the denial of the company's right and the cancellation of its suggestion.

For the reasons given, your office decision must be reversed and the application of Mooney will stand rejected. The company's selection, if otherwise regular and proper, will be submitted for approval.

OKLAHOMA LANDS—QUALIFICATION OF SETTLER—RESIDENCE.

VAUGHN ET AL. *v.* GAMMON.

One who on the day of opening is on a railroad right of way in Oklahoma, and makes the race for land therefrom, is disqualified as a settler by such presence in said Territory.

Prior to the enactment of May 2, 1890, the ownership of other land was not a limitation upon the right of homestead entry in Oklahoma.

An entryman's absence from the land covered by his entry is excusable when due to duress arising from threats of personal violence of such character as to lead the entryman to believe that he could not remain on the land except at the risk of his life.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 23, 1898.* (G. C. R.)

William Gammon has appealed from your office decision of December 19, 1896, affirming the action of the register and receiver in reject-

ing his final proof, offered January 18, 1896, upon his homestead entry made June 7, 1889, for the NW. ¼, Sec. 27, T. 14 N., R. 4 W., Kingfisher, Oklahoma.

It appears that on July 16, 1889, William R. Vaughn filed his affidavit of contest against said entry, alleging prior settlement, etc.; the case reached the Department on Gammon's appeal when on November 4, 1893, it was held (unreported), that Vaughn was disqualified because he was in the territory opened to settlement for more than three months prior to the day of opening, at work for the Santa Fe railroad company; that he did not go out and make the race with others, but remained in the territory and made the race from Edmund Station on the day of opening (April 22, 1889), reaching the land about 2 p. m. of that day. His contest was therefore dismissed.

On April 16, 1894 (unreported), his motion for review was denied.

He then filed his motion for re-review alleging that Gammon, the entryman, was disqualified for the reason that he was at time of entry the owner of six hundred acres of land in the State of Kansas.

The Department denied his motion on October 10, 1894 (unreported), stating that the question raised was between Gammon and the government

to be examined into when he applies to enter and not in connection with this case. If it should appear that he was not qualified, it would not show that the Department was in error in holding that Vaughn was not qualified.

When on January 18, 1896, Gammon submitted his final proof Vaughn appeared and filed his protest, as follows:

1st. That said Gammon was not at the time he made his entry, a legal entryman; that he was the owner of 160 acres of land as said Vaughn believes.

2nd. That said Gammon did not take said land for his own use and benefit.

3rd. That he has not lived on said land as the law requires; that he has not lived on the land above described five years.

4th. That the said Gammon has not made any valuable improvements on said land. This the protestant asks to prove.

The testimony taken under that protest will be hereinafter considered.

Vaughn answers Gammon's appeal filed herein and accompanies his answer with a petition asking a modification of the action of the Department, above alluded to, adverse to him.

His petition will be first considered.

The testimony shows that Vaughn was at work for the Santa Fe railroad company during the prohibited period and did not leave the territory but made the race from Edmund Station on the opening day (April 22, 1889), about one o'clock p. m. when he went to the land reaching there about 2 o'clock p. m., of that day.

It is possible that he thus permitted others to precede him in the race and on that theory, and under more liberal rulings of the Department, it is insisted that he obtained no advantage over others and should, therefore, be held as not disqualified, etc. Sundry cases are cited in support of this position. Fuller *v.* Gault (21 L. D., 176),

referred to, will not do, for Garrett appears to have been outside of the territory at the hour of opening, while Vaughn, in the case at bar, was inside; moreover, in the case cited it is said: "Samuel Crocker was inside the territory at the hour of noon on April 22, and is therefore disqualified as a homesteader therein," citing Smith *v.* Townsend (148 U. S., 490), and other cases.

So in the case of Monroe *v.* Taylor (21 L. D., 284), also cited, it appears that one of the parties charged with "soonerism" (Jordan), to whom the land was awarded, was out of the territory at the hour of opening; the same is true of the party so charged in McCormick *v.* Turner (21 L. D., 151).

The two cases, Jackson *et al. v.* Garrett (25 L. D., 273) and Young *v.* Severy (22 L. D., 121), cited, have little or no bearing in the case and in the remaining case cited, Huyck *v.* Harding (24 L. D., 420), is unlike the one at bar for Huyck made the race with other intending settlers on the opening day.

But it is said that Vaughn was on the right of way of the railroad company on the opening day and was lawfully there; that the right of way was not open to settlement and Vaughn was "technically not upon the land covered by the terms of the proclamation."

The facts in the case of Smith *v.* Townsend (*supra*) are similar to those in this case. Smith in that case and Vaughn in this, were both on the right of way of the railroad company and at Edmund Station, within the territory at the hour of opening, and both were employes of the same railroad company. Of this situation the supreme court in Smith *v.* Townsend, says:

> It (Congress) must be presumed to have known the fact that on this right of way were many persons properly and legally there; it must also have known that many other persons were rightfully in the Territory—Indian agents, deputy marshals, mail carriers and many others; and if it intended that these parties, thus rightfully within the Territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say "any person who may wrongfully enter," etc., but "any person who may enter"—"rightfully or wrongfully" is implied. There are special reasons why it must be believed that Congress intended no relaxation of these disqualifications on the part of those on the company's right of way, for it is obvious that, when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settlement, numbers of settlers will immediately pour into it, and large cities will shortly grow up along the line of the road; and it cannot be believed that Congress intended that they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities.

In the same case it is definitely held that

> one who was within the territorial limits at the hour of noon of April 22, was, within both the letter and the spirit of the statute, disqualified to make entry.

Vaughn disqualified himself; the action of the Department hitherto taken will be adhered to, and his petition is denied.

It is insisted (1) that Gammon was not a qualified entryman, because at the time he made entry (June 7, 1889,) he was the owner and proprietor of four hundred and sixty acres of land in the State of Kansas; (2) that his residence upon the land was not sufficient; (3) that he entered the land not for his own benefit, but for that of another.

Prior to Gammon's entry (June 7, 1889,) there was no prohibition in the statutes against one making [homestead] entry of government lands, who, at the time was the owner of other lands in any quantity, in any State or Territory, provided he had not made a former entry under the homestead laws. The 20th section of the act approved May 2, 1890 (26 Stat., 81), relating only to Oklahoma Territory, for the first time limited the right of entry to persons who were not seized in fee simple of "a hundred and sixty acres of land in any State or Territory." This act was followed by the general act of March 3, 1891 (26 Stat., 1095), amending section 2289, limiting the right of entry to persons who were not the proprietors "of more than one hundred and sixty acres of land in any State or Territory."

It is thus seen that the cases cited by counsel all relate to statutes passed since Gammon made his entry, and have no bearing on the case. Gammon was not therefore disqualified, because, as shown by the testimony, he was the owner of four hundred acres of land in the State of Kansas, when (June 7, 1889,) he made entry. As to his residence, Gammon testified that he went with his family to the land in May, 1890; that he took his teams, intending to break land and build a house; that Vaughn came to where he was and ordered him off and forbade his making improvements, stating that all he should have of the land was "2 by 6;" that he then employed a man to haul lumber; the man did not do the work (presumably because Vaughn forbade him); that about two o'clock that night some men came near where they were camped and "fired off some guns;" this so alarmed his family that he started back to Kansas the next morning, going, however, by way of Kingfisher and obtaining a leave of absence.

In the papers is Gammon's application for this leave, dated June 9, 1890; it is sworn to and states that he was unable to plant a crop on the land because of the threats of Vaughn; alleges Vaughn's disqualifications at time above set out; that Vaughn's threats prevented him from living on the land; that both he and his family were greatly frightened by reason of said threats; that he was afraid of death or great bodily harm from Vaughn on account of the latter's lawless acts and threats against him—hence he wished leave of absence, etc. The statements made in his application were corroborated by Silas Gammon and J. W. Patterson as from their "own personal knowledge." Leave was accordingly granted from May 8, 1890, to February 8, 1891.

In the meantime the contest of Vaughn *v.* Gammon (above referred to) was tried at Kingfisher. On February 12, 1891, Gammon applied for a second leave of absence. In his second application, he repeated, substantially, the statements made in his first; and in addition thereto

stated that during his contest with Vaughn, at Kingfisher, one J. W. McNeal was in attendance thereat in his, Gammon's, behalf; that during the trial the said McNeal "was shot and instantly killed by some one of the friends and sympathizers of said William R. Vaughn." Fearful that his own life would be lost if he attempted to live on the land he asked additional leave until the contest was finally settled. The leave was allowed as prayed for. A third application was made for leave of absence on February 16, 1892, again setting forth Vaughn's threats, his own advanced age (67 years), his want of physical strength or courage to reside upon the land in the face of said threats and his belief that it meant "death to him" to reside on the land in the face of such threats etc. His application was corroborated by W. R. Brownlee, who stated that

from facts which transpired at the trial of the contest of Wm. R. Vaughn *v.* William Gammon and from threats and statements made by said Vaughn in affiant's hearing, that it would be unsafe and extremely dangerous and foolhardy for William Gammon to maintain a permanent residence on the land during the pendency of said contest.

Endorsed on the application is the following:

Leave of absence allowed to claimant as requested, for the reason that it is evident from the allegation of Mr. Gammon in this affidavit and prior affidavits that his life and family is in danger

J. E. ROBERTS,
Rec.

As seen above, the Department on November 4, 1893, held Vaughn disqualified for "soonerism" A certified copy of the proceedings of Gammon *v.* Vaughn under the hand and seal of the clerk of the district court of Oklahoma county, Oklahoma, shows that on December 27, 1893, Gammon filed his complaint in the third judicial district of Oklahoma against Vaughn in which he recites his equitable ownership of the land and that Vaughn, by reason of threats etc., had kept him out of the possession of the premises. A temporary restraining order prohibiting Vaughn from interfering with his right of possession and occupancy was asked; also that Vaughn be summoned to appear before said court, January 16, 1894, and show cause why an order making the temporary order perpetual should not be made by the court, and that upon a final hearing he be allowed the sole and exclusive possession of the premises etc.

On Vaughn's application the temporary restraining order allowed on Gammon's petition aforesaid, was vacated and the cause referred to T. G. Chambers, referee, "to try the matters of law and fact" and present his report, findings and recommendations to the court. The report, made on March 5, 1895, was filed and on motion duly affirmed. The judgment rendered was to the effect that Gammon have immediate possession of the land; that Vaughn was a trespasser thereon and that he be perpetually enjoined from in any manner interfering with the full possession of the land by plaintiff; that Vaughn immediately remove

from the land, failing in which, after notice, a writ issue and the sheriff remove him.

Gammon testified that as soon as he obtained the decision of the Department in his favor (November 4, 1893), he sent a man to the premises to build a house; that this man reported to him that Vaughn had the land fenced with barbed wire and said that he would kill the man (or witness) if either one came to the land; that he was not allowed to build and he then began his suit in ejectment. Vaughn staid on the land until he was forcibly ejected by the sheriff. Gammon thereupon and on March 27, 1895, moved with his family to the land and thereafter continuously resided upon it.

The testimony taken on Vaughn's protest, together with the facts presented in the several applications for leaves of absence, when considered in connection with the matters set forth in Gammon's petition in ejectment and the judgment founded thereon, show conclusively that Gammon had reasonable grounds for fear that Vaughn would either kill him or do him or his family bodily harm, if he (Gammon) undertook to reside on the land while Vaughn was occupying it. Many of these threats were conveyed to him by others. Vaughn introduced several witnesses who testified that they never heard of the alleged threats; but such testimony is of a negative character and of little or no value; Vaughn denies making any threats but there is positive testimony to the effect that he did so—if not by direct words, by hints and innuendoes. The murdering of McNeal at the time and under the circumstances was of itself sufficient to inspire fear in the mind of a timid old man such as Gammon appears to have been. The statement made by Vaughn to him that all the land he should have was "2 x 6" was very suggestive.

Under all these circumstances, and in view of the action taken by the local officers upon the several leaves of absence duly applied for and allowed, Gammon's absences from the land were excusable.

Finally, did he enter the land in behalf of another? The evidence on that point fails to show that he did. When asked the question if he did not state that he was going to file on the land for his grandson, he said he did not make the statement for his grandson had already filed on a tract for himself. On this point witness W. A. O'Brien testified that in a general conversation addressed to several persons, he heard Gammon say he was going to file on a piece of land "for his grandson or his son in-law, I would not be positive which." T. W. McFowell says that in Kingfisher in 1890 he heard Gammon say in general conversation that he "filed on it for his grandson, that was all as near as I can remember;" on cross examination this witness said he passed Gammon and others in the street and while passing heard said statements. The testimony of these two witnesses is too uncertain and indefinite to support the charge that the entryman took the land for another, especially in the presence of the positive denial of the latter,

and the further fact that the grandson, for whom it is alleged the land was entered, had entered a tract in his own name.

After carefully considering the testimony in the record, and noting all counsel has so ably presented in favor of Vaughn and against Gammon, it must be held:

1. That Gammon was a qualified entryman.

2. That Vaughn disqualified himself by being in the territory during the prohibited period and in failing to go out and make the race with others.

3. That Gammon's absences from the land for the reasons stated are excusable, and

4. That Gammon entered the land for his own use and benefit.

It appears that on June 28, 1897, Gammon moved the acceptance of his final proof, offered January 18, 1896, and at the same time tendered in payment for the land $1.25 an acre. He will be duly notified that the payment will now be received, and certificate will issue, under proof of residence and improvements already offered, upon his making new final affidavit.

It appears that on February 4, 1896, the register and receiver rejected the application of Phillip Leedom to make homestead entry of the land, and that your office in the decision appealed from affirmed that action because the land was covered by Gammon's entry. Leedom's further appeal brings the case here. Leedom filed his affidavit of contest against said entry, alleging failure on Gammon's part to establish or maintain a residence, etc.

From the recitals in the decision above set forth, detailing in full Gammon's acts of settlement and residence, and the judgment rendered thereon holding that his absences were excusable, it is apparent that another contest involving an issue already tried should not be allowed. Leedom's appeal is accordingly dismissed.

The decision appealed from is reversed.

ENTRY BY REGISTER—SECTION 2287 R. S.

SNYDER *v.* BARRETT.

The right of a homesteader, who after settlement and entry is appointed register, to perfect title to the land "under the preemption laws," as provided in section 2287 R. S., is not defeated by the repeal of the preemption statutes, for said phrase as used in such section is not limited in its meaning to the preemption law as such, but used to indicate a preferred right of purchase similar to that conferred by the pre-emption law.

Acting Secretary Ryan to the Commissioner of the General Land Office
(W. V. D.) *September 23, 1898.* (G. B. G.)

On February 24, 1894, the defendant Michael J. Barrett made homestead entry for the SW. ¼ of Sec. 14, T. 140, R. 64 W., Fargo, North

Dakota, after a successful contest against the entry of one Johnson R. Darrock, embracing said tract.

On September 8, 1894, one Josephine Nichols initiated a contest against the said entry of Barrett, alleging that he had wholly abandoned said tract of land and had not settled upon and cultivated the same as required by law.

The Department, on October 3, 1896 (unreported), affirming the action of your office dismissing Nichols's contest found from the testimony the following facts: That a large part of the tract was broken in the autumn of 1892, and nearly all of the balance in the spring of 1894, when it was seeded to wheat, oats, millet, and a garden made; that a cellar was dug during the summer of 1894, rock hauled for a foundation, and a house, with a kitchen attached, twelve by sixteen feet, brought upon the land in the month of July; that Barrett moved upon the land with his family, on August 20, 1894, and lived there until he went to Minot, where he had been appointed register of the United States land office; that during the season of 1894 he made six hundred bushels of wheat, seven hundred and seventy bushels of oats, and fifty tons of millet, besides vegetables.

That case was finally closed December 15, 1896.

On September 28, 1897, Barrett filed his notice of intention to submit final proof on November 16, 1897, which notice was duly posted and published according to law.

On November 15, 1897, Edwin Snyder filed in the local office his protest against allowing said proof, as follows:

> That said Michael J. Barrett has failed to make settlement on said land prior to making said entry, and to follow up said settlement or any settlement whatever on said land by inhabitancy in good faith and establish his residence thereon to the exclusion of a home elsewhere within six months next subsequent to date of said entry. That he and his family, consisting of a wife and children, have resided in said Jamestown, in said county and State, prior and since date of said entry for six years last past and until he moved therefrom to Minot, North Dakota, to which place he had been appointed register of the United States land office; that since he has been succeeded in said land office he has . . . . wholly failed to establish or return to, or maintain a residence on said land, and is not at present a resident in person or any member of his family thereon. That there is no habitable house or dwelling on said land, and has not been since date of said entry. That when he claimed he moved on said land, August 20, 1894, he went thereto for the purpose of hunting prairie chickens, and stayed over night in the depleted old house, now unoccupied by any one, nor is there any household goods or furniture therein and has not been since date of said entry; that said tract of land is situated about two miles distant from said Jamestown, North Dakota; that said entry is made in bad faith and for the purpose of speculation, and not for the purpose of actual settlement, cultivation and a home to the exclusion of a home elsewhere.
>
> That he has repeatedly tried to sell the same and offered to sell it to different persons and to deponent since making said entry for the sum of twelve hundred ($1200.00) dollars. That said entry was not honestly made in good faith; that notice of . . . . intention to make final proof has been duly issued before John Knauf, county judge, at Jamestown, North Dakota, on November 16, 1897; that the witnesses named in said notice are not persons residing next nearest to the land

involved; that five years have not elapsed since the date of said entry; that the breaking claimed to have been done by said entryman in the autumn and spring of 1892, was not done or caused to have been done by him, and said tract was covered at that time by the timber culture entry number 11,558, Johnson R. Darrach. That in view of the allegations herein set forth deponent protests against allowing said proof of record; that he is ready to prove that at such time and place as may be named by the register and receiver for hearing said case, and he therefore asks to be allowed to prove said allegations that entry number 20,911, February 21, 1894, may be declared canceled and forfeited to the United States.

The local officers refused to issue notice on this protest, but informed the attorney for Snyder that the protestant must appear at the time and place named in the final proof notice.

It appears that another and different attorney attended the final proof proceedings on November 16, 1897, and, representing the attorney who filed said protest, on behalf of Snyder requested that the hearing be adjourned until the next day. Barrett being present with his witnesses this request was refused, but the attorney present was requested to cross-examine Barrett and his witnesses, which he refused to do.

Barrett's final proof was duly received by the local officers on November 17, 1897, at which time he appeared in person and tendered the sum of $400 purchase money and $1.50 testimony fee, which were refused, because another protest had been filed by Snyder on that day. This second protest does not go to the merits of the controversy, but is in the nature of a protest against the action of the officer before whom the final proof was taken in refusing the continuance asked for, and insisted, in view of the matters therein set out, "that the register and receiver issue a notice citing the claimant to appear at a date named and show cause why his entry should not be canceled to the United States."

The local officers approved the proof submitted, and recommended that the usual certificate in such cases issue.

Snyder appealed; whereupon, your office on April 14, 1898, dismissed his contest and directed the local officers to issue to Barrett a final certificate and receipt upon the payment of the necessary fees and purchase money.

The appeal of Snyder to the Department contains two specifications of error:

(1) The said decision is contrary to existing laws and regulations of the Interior Department as to the rights between a homestead claimant and the government.

(2) It was gross error to dismiss the protest and contest of appellant based on his duly corroborated affidavit showing a prima facie cause of action against the defendant in which the government is an interested party.

This appeal is out of time, and might well be dismissed for that reason, but inasmuch as the protest alleges fraud and irregularities in the procedure by which Barrett is attempting to acquire title to government land, the case has been considered on its merits.

The protestant does not allege an interest in the land, but appears as the friend of the government; it is therefore not material whether

the final proof officer erred in refusing to grant a continuance, nor whether the local officers erred in refusing to order a hearing, unless the Department is of opinion that a *prima facie* showing has been made that the entryman has failed to comply with the law.

Every question going to the good faith and sufficiency of this entryman's settlement, residence and cultivation of the land in controversy up to the date of his appointment as register of the land office at Minot has been finally adjudicated in his favor, after a protracted litigation. He had, up to October 15, 1894, complied with the law. At that time he moved his family from the land to the town of Minot, North Dakota. It appears that he was register of the United States land office at that place, from August 8, 1894, till October 23, 1897, that during the time he was such officer he had the land cultivated, and that his improvements, including a dwelling house on the tract, are worth at least $1000.

The law requires registers and receivers to reside at the place where their office is kept. This makes it impossible, in many instances, for a homesteader who has been appointed to such office to continue his residence upon his homestead, and in view of this, section 2287 of the Revised Statutes was enacted, whereby it is provided that:

> Any bona-fide settler under the homestead or preemption laws of the United States who has filed the proper application to enter not to exceed one quarter-section of the public lands in any district land-office, and who has been subsequently appointed a register or receiver, may perfect the title to the land under the preemption laws by furnishing the proofs and making the payments required by law, to the satisfaction of the Commissioner of the General Land-Office.

The case of Barrett is within this section. He was a bona fide settler under the homestead law, had filed a proper application and made entry of a quarter section of the public domain, was subsequently appointed a register, and has furnished proofs the essential portions of which have already been passed upon favorably by the Department.

If it be said that Barrett may not perfect title to this land under the "pre-emption laws," for the reason that these laws were repealed by the act of March 3, 1891, and prior to the initiation of his claim to the land in controversy, the answer is, that the manifest purpose of this section was to award a preference right of purchase to persons within its provisions, and although it was provided that such persons should be permitted to perfect title "under the pre-emption laws," it is believed that the word "pre emption" as here used is not limited in its meaning to the pre-emption law as such, but may be applied to other cash purchases where the preferred right of purchase is restricted by conditions similar to those imposed by the pre-emption law.

> Pre-emption, in its etymological sense, may be said to be the buying or the right to buy before or in preference to any other person, which differs from its legal sense only in that in law conditions are coupled with and made precedent to the exercise of the right. Stephen *v.* Paul *et al.*, 22 L. D., 131.

It appearing that Barrett's notice of intention to submit final proof was given before his term of office as register expired, his case is not open to the objection that he failed to avail himself of the benefits of the said section 2287 during his incumbency. His final proof is approved, and he will be permitted to perfect his title upon the payment of the government price for the land.

The decision appealed from is affirmed.

REPAYMENT DESERT LAND ENTRY - MISTAKE IN DESCRIPTION.

ADOLPH NELSON (ON REVIEW).

The right of repayment does not exist where a desert entry, on the proof presented, is properly allowed and its subsequent cancellation is due to the discovery that through mistake, not the fault of the government, the entry in fact covers land not reclaimed or intended to be entered.

The case of Thomas Madigan, 8 L. D., 188, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 23, 1898.* (C. J. G.)

Adolph Nelson, through his attorney, has filed a motion for review of departmental decision of July 22, 1898 (27 L. D., 272), wherein is affirmed the action of your office in denying his application for repayment of purchase money paid by him on desert land entry for Sec. 5, T. 21 N., R. 3 E., Helena land district, Montana.

The facts of the case are fully set forth in the departmental decision referred to, showing that the land above described and upon which proof was made and final certificate and patent issued, was not the land actually irrigated and reclaimed and upon which the entryman has his improvements. This mistake, according to entryman's own admissions, was due to a surveyor employed by him. The Department therefore held that the error did not occur in the allowance of the entry, which is the act of the government, but in the declaratory statement and proofs submitted by the entryman, and that the case is not embraced in the repayment statute.

In support of the motion for review, attention is called to the case of Ignatz Reitober, 22 L. D., 615; but in that case Collins had made homestead entry of the land and subsequently Reitober filed what purported to be Collins' relinquishment, which the local officers accepted as genuine, and thereupon canceled Collins' entry upon the records and permitted Reitober to make homestead entry of the same land. In fact the purported relinquishment by Collins was an absolute forgery so that the cancellation of his entry was altogether unauthorized and could not operate to extinguish it. Reitober purchased the purported relinquishment from a third party without knowledge of the forgery. Subsequently, learning the real facts and knowing that a homestead entry of land embraced in an unextinguished prior homestead entry of another could not be lawfully allowed or confirmed, Reitober relinquished his own entry and made application for repayment of the fees

and commissions paid by him in making his entry. Repayment was allowed, it being held that Reitober's entry was erroneously allowed and could not be confirmed. That case is not applicable here.

Reference is also made to the case of Thomas Madigan, 8 L. D., 188, in which repayment was allowed in a case, the facts of which are very similar to those in the case at bar, but while there seemed to be a strong equity in Madigan's favor, as there is in Nelson's favor in the case at bar, the Madigan case does not refer to the repayment statute, does not cite any prior decision or ruling in a similar case, and does not constitute a precedent justifying a departure from the plain and unambiguous language of the repayment statute, which reads as follows (21 Stat., 287):

SEC. 2. In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same.

The Madigan case is accordingly overruled as not being in harmony with the repayment statute or the rulings of the Department.

No error was committed in allowing Nelson's entry. The making and submitting of the proof was the act of Nelson: the examination of the proof and records of the local office and the allowance of the entry were the acts of the local officers. Nelson's proof was regular upon its face, showed due reclamation of the tract described and no obstacle to the entry appeared upon the records of the local office. It was therefore properly, and not erroneously, allowed. Nelson intended to enter one tract, which he had irrigated and reclaimed, but in fact entered another tract which had not been irrigated or reclaimed, and by mistake he made his proof apply to and describe the tract which was not reclaimed. This entry had to be canceled because, as was subsequently ascertained, the land had not been reclaimed and he could not make entry of the other tract because it was withdrawn from entry.

This ruling is supported by a long line of decisions, among which are:
David Craven, 2 L. D., 683;
William E. Creary, 2 L. D., 694;
Arthur L. Thomas, 13 L. D., 359;
W. W. Wishart, 17 L. D., 489;
Louise C. Grothjan, 23 L. D., 414;
Christopher W. McKelvey, 24 L. D., 536;
John C. Angell, 24 L. D., 575;
George A. Stone, 25 L. D., 110, 111;
Edward H. Sanford, 26 L. D., 3;
Lafayette D. McDow, 26 L. D., 283.

The Department adheres to its former decision in this case, and Nelson's motion for review is denied.

TOWNSITE—SURVEY—FINAL OATH OF DEPUTY SURVEYOR.

HOMER TOWNSITE.

There is no statutory authority under which a notary public can be recognized as a proper officer before whom a deputy surveyor can take the final oath on the completion of a survey; hence the survey of a townsite cannot be approved where said oath is administered by such officer.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 23, 1898.* (E. F. B.)

I have considered the appeal of deputy surveyor Albert Lascy from the decision of your office of March 2, 1897, suspending Alaska survey No. 12, of the townsite of Homer.

Said survey was suspended "for the reason that the corners were improperly described, of error in course, and that the final oath of the deputy surveyor was not taken before the proper officer."

In said decision, your office, after quoting from the field notes of the survey, concludes that the witness corners established on the line of ordinary high-water mark are described as being below the line of ordinary high-water mark.

An examination of the field notes fails to disclose any reason for such conclusion. The field notes as quoted in said decision state distinctly that the survey was commenced at a point at ordinary high-water mark on the beach at the south end of Coal Spit, at which the beginning corner was established by a monument set in the ground, from which point, by given courses and distances, the water of Kachekmak Bay and Cooks Inlet was meandered, along the line at ordinary high-water mark. The position of the witness corner relative to the beginning corner is stated in the field notes to be *north* 1.50 chains distant, var. 25° east, which would place it above high-water mark, and it is so laid down in the plat. In course No. 10 the deflective angle was by clerical error given as 12° 24′ to the left. This should have been 22° 22′ to the left, and has been since corrected to correspond with the original notes.

This survey was also suspended for the reason that the final oath of the deputy surveyor was taken before a notary public, an officer not authorized by paragraph 11 of the Manual of Instructions to administer the final oath to deputy surveyors. The exclusion of notaries public from the list of officers before whom such oath may be taken was made in view of the decision of the court in the case of the United States *v.* Hall, 131 U. S., 50, in which it was held that no statute of the United States authorizes notaries public to administer an oath to a deputy surveyor of the United States in regard to the manner in which he has fulfilled a contract for surveying public land.

Section 2231 Revised Statutes requires that upon the return of a survey the deputy surveyor shall take and subscribe an oath that the survey has been faithfully and correctly executed according to law

and the instructions of the surveyor-general. This oath can only be taken before an officer authorized by the statute to administer such an oath, so that the affiant would be subject to the pains and penalties for false swearing, as provided for by the statute.

Although it is alleged by this appellant that the expense which would be incurred in appearing before an officer authorized by paragraph 11 of the Manual of Instructions would be so great as to render his service unprofitable, if it did not entail upon him an absolute loss, there is no power in the Department to modify the instructions in this respect, in view of the positive requirement of the law and decision of the court above referred to.

Upon a final oath being executed before an officer designated in said paragraph 11 the survey will be approved.

The decision of your office of March 2, 1897, is modified accordingly.

ALASKAN LANDS—FINAL PROOF OCCUPANCY.

ALASKA IMPROVEMENT CO.

Under the act of May 14, 1898, the testimony on final proof may be taken outside of Alaska, in the case of a purchase of lands in said Territory.

Any entry of lands in said Territory for the purpose of trade and manufactures under the act of March 3, 1891, must be limited to the land possessed and actually occupied for such purpose.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 23, 1898.* (E. F. B.)

I have considered the appeal of the Alaska Improvement Company from the decision of your office of March 16, 1897, rejecting the final proof offered by said company upon its application to purchase the land embraced in Alaska survey No. 44, and holding for cancellation the cash entry made thereon.

Said proof was rejected upon the following grounds:

First. Because there was no evidence that the notice of intention to make proof remained posted for thirty days preceding the time of making proof.

Second. Because the proof was taken outside of the territory of Alaska; and—

Third. Because the official survey shows that the improvements of the company do not actually occupy a frontage on the Karluk river of more than half of the frontage claimed.

Since said decision was rendered, the company has filed an affidavit showing that the notice of intention to make final proof remained posted from August, 1893, until the summer of 1894, which supplies the required proof as to the sufficiency of notice.

The act of May 14, 1898 (30 Stat., 409), provides:

That all affidavits, testimony, proofs, and other papers provided for by this act, and by said act of March third, eighteen hundred and ninety-one, or by any departmental or executive regulation thereunder, by depositions or otherwise, under com-

mission from the register and receiver of the land office which may have been or may hereafter be taken and sworn to anywhere in the United States, before any court, judge or other officer authorized by law to administer oaths, shall be admitted in evidence as if taken before the register and receiver of the proper local land office.

Under authority of this act the testimony of the witnesses taken in San Francisco should be considered.

The water front possessed and occupied by the company as shown by this survey, is, as stated in the decision of your office less than one-half of the frontage claimed. An entry of lands in Alaska for the purpose of trade or manufactures, under the act of March 3, 1891 (26 Stat., 1095), under which this entry was made, must be limited to the land possessed and actually occupied for such purpose. John G. Brady, 26 L. D., 305, and authorities therein cited.

You will therefore notify claimant that the survey must be amended so as to cover only the land actually used and occupied by it for trade or manufactures, and upon default of compliance herewith, within a reasonable time, of which you shall give notice, the entry will be canceled.

REPAYMENT—DOUBLE MINIMUM EXCESS.

KITTY MAYNARD.

An application for the repayment of double minimum excess is properly allowable, if the land purchased is found not to be within the limits of a railroad grant, though it may have been within the limits of an unrevoked withdrawal at the date of purchase.

Secretary Bliss to the Commissioner of the General Land Office, September 21, 1898.

(W. V. D.) (F. W. C.)

An appeal has been filed from your office decision of October 17, 1896, denying the application of Kitty Maynard, widow of John C. Maynard, for repayment of the double minimum excess paid on San Francisco, California, cash entry No. 1743, dated June 27, 1868, covering lot 1, N. ½ SW. ¼ and SW. ¼ SW. ¼, Sec. 18, T. 5 S., R. 4 W., for the reason that at the date of said purchase the land was properly rated at $2.50 per acre, being within the limits of the grants for the Central Pacific and Southern Pacific Railoads.

This tract is within the limits of the withdrawal ordered by letter of December 23, 1864, based upon the map of general route filed by the Central Pacific R. R. on December 8th, 1864, and is opposite the portion between San Francisco and San Jose.

By the act of July 1, 1862 (12 Stat., 489), the Central Pacific Railroad Company was authorized to construct a railroad and telegraph line from the Pacific coast at or near San Francisco or the navigable waters of the Sacramento river, to the eastern boundary of California. See section 9.

On December 24, 1862, it filed its acceptance of the act, having prior

thereto, to wit, on June 30, 1862, filed a map designating the general route of the road from Sacramento to the big bend of the Truckee river in the then Territory of Nevada.

Immediately following the passage of the amendatory act of July 2, 1864 (13 Stat., 356), a corrected map showing the general route between the same termini was filed and your office was instructed to make withdrawal thereon July 6, 1864.

Prior to the passage of said amendatory act the San Francisco and San Jose Railroad Company had constructed a railroad between San Francisco and San Jose, and on July 9, 1864, said company filed a map of its road upon which withdrawal was requested.

It might be here stated that on December 4, 1862, the Central Pacific Railroad Company assigned to Timothy Dame *et al.* the right to construct that portion of the road between Sacramento and San Francisco by way of San Jose. Timothy Dame and associates adopted articles of association under the name of the Western Pacific Railroad Company, and thereafter assigned to the San Francisco and San Jose Railroad Company the right to build the road between San Francisco and San Jose.

On October 31, 1864, the Central Pacific Railroad Company assigned to the San Francisco and San Jose Railroad Company whatever rights it acquired under the acts of July 1, 1862, and July 2, 1864, to construct a railroad between San Francisco and San Jose.

No action was taken upon the request made by the San Francisco and San Jose Railroad Company for a withdrawal on its map filed July 9, 1864, and on December 9, 1864, the Central Pacific Railroad Company filed a map designating a route from San Francisco by way of San Jose to Sacramento, upon which a withdrawal was directed on December 14, 1864.

It was upon this order that the withdrawal was made which included the tract in question within its limits.

Upon the consideration of the question as to the rights of the San Francisco and San Jose and the Central Pacific Railroad Companies to a grant for the portion of the road between San Francisco and San Jose it was held in departmental decision of October 31, 1867, in view of the proviso to section 11 of the act of July 2, 1864, which reads:

> *Provided, also,* That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made prior to the passage of the act to which this act is an amendment, or made subsequent thereto under the provisions of any act or acts other than this act, and the act amended by this act.

that a grant was not made on account of the road constructed by the San Francisco and San Jose Railroad Company, between said points, and the claim made by the San Francisco and San Jose Railroad Company as assignee of the Central Pacific Railroad Company, was denied; further, the order of withdrawal made upon the map filed by the Cen-

tral Pacific Railroad Company in December, 1864, was revoked and the lands ordered restored, on November 12, 1867.

Under the grant made by the act of July 27, 1866 (14 Stat., 292), to aid in the building of a railroad from a connection with the Atlantic and Pacific Railroad near the eastern boundary of California to San Francisco, the Southern Pacific Railroad Company on January 3, 1867, filed a map of general route from San Francisco via San Jose to the Colorado river, upon which withdrawal was ordered to be made.

Due to the previous withdrawal in 1864, upon the map of general route of the Central Pacific Railroad, the withdrawal on account of the location of the Southern Pacific Railroad began at San Jose.

This company claimed a right to a grant from San Francisco by way of San Jose to the Colorado River, and presumably for that reason the restoration was not made following the direction given in November, 1867.

The claim of the Southern Pacific Railroad Company was considered July 14, 1868, and it was held that the designation of general route shown upon the map filed January 3, 1867, was not in conformity with law and the order previously given for a withdrawal thereon was revoked. The revocation was subsequently suspended as to the portion of the road between San Jose and the Colorado River, but the order for restoration between San Francisco and San Jose stood and on August 31, 1868, your office ordered the restoration of the lands between the points last mentioned. Since this restoration it does not appear that either the Central Pacific or Southern Pacific railroads have laid claim to a grant between the last mentioned points.

It results from previous adjudications that neither the Central Pacific Railroad Company nor the Southern Pacific Railroad Company ever made a valid location between San Francisco and San Jose, and if either had a grant between said points, which is not admitted, the same has been forfeited for failure to construct the road prior to September 29, 1890, the date of the general forfeiture act, and while the land entered by Maynard was within the limits of a withdrawal which had not been revoked at the date of his purchase, yet it must be held that the tract purchased has been found not to be within the limits of a railroad land grant, and the application for repayment of the double minimum excess should be allowed under section 2 of the act of June 16, 1880 (21 Stat., 287).

Your office decision is therefore reversed and the application should be certified for repayment.

INDIAN LANDS—ALLOTMENT—TREATY RIGHTS.

HAYDEN *v.* TINGLEY ET AL.

The rule announced in the case of Adams *v.* George, 24 L. D., 424, that the action of the office of Indian Affairs on allotments is conclusive, so far as the General Land Office is concerned, as to the right of the Indian, is an administrative regulation as between the Office of Indian Affairs and the General Land Office, but does not limit the authority of the Department to see that the lands are properly disposed of, and that the allotments are properly allowed.

The rights of persons protected under article 6 of the agreement ratified May 1, 1888, became fixed on the ratification of said agreement, and the subsequent reservation, as a hay reserve, of lands surrounding those settled upon by members of a tribe signing said agreement, will not affect rights so protected.

Secretary Bliss to the Commissioner of the General Land Office, September 24, 1898.

(W. V. D.) (C. J. W.

On February 6, 1889, Robert S. Tingley filed Indian allotment application No. 15, under act of February 8, 1887 (24 Stat., 388), for unsurveyed land, which was adjusted August 22, 1896, to the SW. ¼ of the SE. ¼ of Sec. 8, and the NW. ¼ of the NE. ¼ of Sec. 17, T. 28 N., R. 13 E., Helena land district, Montana, and on the same day Oliver C. Tingley filed Indian allotment No. 16 for unsurveyed land, which was adjusted to the SE. ¼ of the SE. ¼ of Sec. 8, and the NE. ¼ of the NE. ¼ of Sec. 17, same township and range. Said allotments were approved by the Department June 28, 1892.

On June 2, 1896, William Hayden was permitted to make desert land entry No. 3231 for unsurveyed land, which was adjusted August 22, 1896, to the SW. ¼ of the SE. ¼, the E. ½ of the SE. ¼, and the SE. ¼ of the NE. ¼ of Sec. 8, T. 28 N., R. 13 E., Helena land district, Montana.

It appears that said desert land entry conflicts with allotments Nos. 15 and 16 of O. C. and Robert S. Tingley, as to the SW. ¼ of the SE. ¼ and the SE. ¼ of the SE. ¼ of Sec. 8. Based on such conflict, your office, on December, 30, 1896, held Hayden's desert land entry for cancellation.

The case is before the Department on the appeal of Hayden from your office decision, in which error is alleged as follows:

1. In failing to observe and give due effect to the fact that at the date of the alleged approval of said Indian allotments by the Secretary of the Interior on June 28, 1892, the land in question was unsurveyed.

2. Because at the date of appellant's entry (June 2, 1896) the land in question was vacant, unappropriated public lands of the United States, land wholly unimproved.

3. Because neither at said date nor previously was the land in question in the possession of said Robert S. Tingley or O. C. Tingley, or either of them, nor had either of said parties settled upon, occupied, resided upon or improved any portion of the said land.

4. Because there was nothing upon the land in question, either by way of improvement, adverse possession, marking of boundaries, or otherwise, which could have operated as notice to appellant that the said land was claimed by the said Tingleys.

or either of them, and appellant was wholly ignorant of any claim of said parties thereto.

5. Because in the absence of prior occupation of said land or settlement upon or improvement thereof by the said Tingleys, or either of them, or some notice to appellant that they claimed the same, it would be unjust and wholly without legal authority to deprive appellant of the rights gained by his entry, and to award the same to the said Tingleys, or either of them.

6. Because appellant made his said entry in ignorance of any claim of the said Tingleys, or either of them, thereto, that in all respects he has conformed to the law in connection with the same and has improved and reclaimed said land from its desert character.

7. Because the adjustment of the said Indian allotments No. 15 and No. 16 on August 22, 1896, and subsequently to appellant's said entry, was in violation of the rights previously acquired by him to the land in controversy, and in effect is an attempt to deprive him of his property without due process of law.

On August 16, 1898, supplemental grounds of error, enlarging upon those first filed, were filed, together with a brief and argument by counsel for Hayden, and accompanied by affidavits in support of a request that a hearing be ordered.

It is alleged that the Tingleys are the children of a white man by a quarter-breed Indian woman and have never sustained tribal relations with any Indians or resided on any Indian reservation, and that they had not settled upon the land mentioned in their respective allotment applications on May 1, 1888, the date of the act confirming the agreement by which the land was ceded, or at the date when their applications were filed.

The applications were made as under the act of February 8, 1887 (24 Stat., 388), and no reference is therein made to the agreement of May 1, 1888 (25 Stat., 113), now relied upon as the basis of their claims. Article six of said agreement, *inter alia*, declares:

It is further agreed that any Indian belonging to either of the tribes or bands, parties hereto, who had, at the date of the execution of this agreement by the tribe or band to which he belongs, settled upon and made valuable improvements upon any of the lands ceded to the United States under the provisions of this agreement, shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantity as follows: To the head of the family, one hundred and sixty acres; to each child over eighteen years of age, eighty acres; to each child under eighteen years of age, forty acres; and the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto.

Reference to the affidavits filed with the applications by the two Tingleys shows that they did not allege settlement upon the land at the date of the agreement by which it was ceded, and there would therefore seem to have been no adjudication of the fact that they were such settlers at that time, or entitled to allotments under the sixth article of said agreement. It is conceded that the tracts involved formed a part of the Fort Assiniboine military reservation, created by executive order of March 2, 1880, that they were released from reservation by executive order of May 2, 1888, but were again reserved by

executive order of September 25, 1888, for military purposes, as a hay reserve. As this order was of force at the date, February 6, 1889, when the Tingleys filed their allotment applications under the act of February 8, 1887, the lands were not subject to such applications, except specifically under the sixth article of the agreement before cited.

It is objected, however, by counsel for the Tingleys, that the allotments having been allowed and approved by the Department, the matter is *res judicata* under the authority of the case of Adams *v.* George (24 L. D., 424), and can not now be further considered.

The rule announced in that case is an administrative regulation, applicable as between your office and the Office of Indian Affairs, in reference to allotments, but does not operate as a limitation on the authority of the Department to see that the lands are properly disposed of, and the allotments not unlawfully allowed.

The objection that the lands in question were not subject to allotment under the act of February 8, 1887, at the time the applications were made, is met by the suggestion that they were subject to allotment under the sixth article of the agreement before referred to, and that the allottees can lose no rights by having used a wrong form of application.

There is great force in this suggestion, and no doubt is entertained but said allotments should stand, if they are valid under said article six of the agreement of May 1, 1888; but for the reason that the allotment applications fail to allege such state of facts as would constitute a right under that article, the desert land entryman should be allowed to show that such facts do not exist, if he can, and to the end that he may be heard as to the truth of his allegations, a hearing seems to be necessary.

Upon the ratification of the agreement made with the Indians by Congress, the rights of persons, under article six of the agreement, were fixed, and the subsequent reservation of lands as a hay reserve, surrounding those settled upon by members of a tribe signing the agreement, did not change or affect the rights of such persons.

It is suggested by counsel for allottees, based on the fact that the tracts in question were included in a hay reservation, and upon an extract from a letter written by Louise Tingley, mother of the allottees, that they are not, and never were, desert lands, but are low-lying lands, which have always, without artificial irrigation, produced crops of natural hay.

As a hearing is to be had, the investigation should extend to and include inquiry into the character of the land at the time Hayden's desert-land entry was made.

The case is accordingly remanded for further action and your office is directed to order a hearing, at which Hayden may offer proof in support of his allegations, and at which the allottees may offer proof as to

the character of the land before and at the time of Hayden's desert land entry.

You will also give notice of the hearing, when ordered, to the Commissioner of Indian Affairs, that a special agent may be present at the hearing to look after the interests of said allottees.

Your office decision is modified to conform hereto.

RENSHAW *v.* HOLCOMB.

Motion for review of departmental decision of July 1, 1898, 27 L. D., 131, denied by Secretary Bliss, September 24, 1898.

OKLAHOMA LANDS—ACT OF SETTLEMENT.

SLANE *v.* LONG.

A stake, bearing a flag, used on the day of opening to indicate an arrival on, and claim to the land on which it is placed, as against competing settlers on said day, will not be available as against subsequent settlers, if not followed within a reasonable time by acts showing an intention to make a bona fide settlement.

Secretary Bliss to the Commissioner of the General Land Office, September 26, 1898.

(W. V. D.) (L. L. B.)

James K. Long has appealed from your office decision of December 14, 1896, holding for cancellation his homestead entry for the NE. ¼ of Sec. 15, T. 22 N., R. 10 W., Alva, Oklahoma, on the contest of Lott A. Slane claiming prior settlement.

Long's entry was made November 1, 1893, his application made October 23, 1893, having been suspended in the meantime to await the production of his booth certificate.

Slane's contest was initiated December 12, 1893, but the hearing was not had until May 6, 1895. Slane made the race for the land on the day of the opening, 16th of September, 1893, and reached the tract about 3 or 4 o'clock on the afternoon of that day. There was no other race claimant, and his right to the land was not disputed until October 23, when Long offered to enter it. At the trial no evidence was introduced for the contestant except his own testimony, and his affidavit for a continuance stating what some other witnesses would testify if they were present, the defense having admitted that they would so testify in order to avoid a continuance. According to his testimony he remained on the claim "about four days" when he went back to where he had been living in the Chickasaw Nation about a hundred miles distant after his "things to move back." During the four days that he remained on the land he stuck a stake with a flag attached to it and threw up a mound around it, dug a hole in the bed or bank of Indian Creek about two feet

deep, when he procured water, then borrowed an ax from old man Dugger and trimmed up some jack oaks and cut out the small underbrush on about two and one-half acres where he intended to place his house. These are the acts of settlement that he claims to have performed prior to starting for the Chickasaw Nation. He gives the date of his return at about November 5th following, but the best evidence is that he did not return until the 11th of November. His excuse for not returning sooner is as follows:

> First high water in the South Canadian river; it had washed out both the Sante Fe and Rock Island railroad bridges that crossed that river, and it was about two weeks before it could be crossed with a wagon.
>
> Q. Any other cause?—A. I was sick also. I started back and the river being up I turned and went back to where I was stopping (in Chickasaw Nation) waiting there for the river to get so I could cross it. I became sick and unable to travel for about fifteen days. After I was able to travel I got what few things I had together and started up here.

On cross-examination he admitted that he could have taken the train or been ferried across the river and would have done so if he had known that anyone else was on his claim. His testimony is supported by his affidavit for continuance in which he sets out what he would be able to prove by the testimony of five absent witnesses. One Helmne would say that when he (Slane) was on his way back to the Chickasaw Nation he left with Helmne his pony and told him that he would return to his claim in a week or ten days. That Farragus Dugger and Annie Ray if present would testify to his presence on the land on the 16th of September, 1893, and for several days thereafter and that he was "improving, occupying and claiming said land as his homestead" and that there was no other occupant of the land at that time, and that Annie Ray would further testify that

> She heard old man Dugger the father of Farragus Dugger tell Long before he Long filed on the land, that this affiant had taken the land in dispute . . . . and that said Long said he did not care;

and that both said last mentioned witnesses would testify that Slane returned to the land about November 5, 1893, and has resided upon and improved the same since said date. That F. M. Burge and Henry Holt would testify that affiant returned to the Chickasaw Nation about the 25th of September, 1893, and was detained from starting back to the strip by high water in the Cimarron and Canadian rivers for about ten days; that when the water went down he was taken sick and was not able to proceed for fifteen days; that said Burge would further testify that he was a physician and attended affiant in his sickness, and that affiant started to return to his claim before said sickness came upon him, and that it was upon his return from the Canadian river that said sickness overcame him.

A careful scrutiny of the testimony does not sustain his claim to having trimmed up the trees and cut the small brush from two and a half acres of land prior to leaving for the Indian Territory. A. P. Hatfield,

a witness for the contestee, says that he examined the claim thoroughly between the first and fifteenth of October (1893) that he crossed it and recrossed it; that he made the examination with a view of taking the claim himself, and that the only evidence of a claim to the land was a stake with a flag on it. That after this examination he went to Harper City to get some money to file on it and when he came back about the 22nd or 23rd, of October he found a man to do a little plowing on the claim and went to the land office to file on it and there found that there was an application to enter already pending.

B. F. Welch, whose claim adjoins this one on the south, and with whom Slane slept and ate from Sunday or Monday after the opening on Saturday until the following Wednesday, when he left for the Chickasaw Nation, also testifies that he had walked all over the claim hunting and never saw any improvements on the tract up to the 11th (November) and never saw Slane make any improvements prior to the 20th of September, when he left as aforesaid. He said he saw him when he borrowed the axe from Dugger and that he said he borrowed it to trim off some trees but was gone with it only about an hour.

James K. Long, the defendant, says that he examined the tract thoroughly on the 18th or 19th of October and saw nothing in the nature of improvements on it, and that he went back on the 20th of October and dug a trench in which to place the foundation of his house, then went to Alva and made application to file either on the 22nd or 23rd of the same month; that his application was suspended to allow him to procure his booth certificate which he did and completed his entry on November 1st. In the meantime between the date of his application and his entry he put up his tent on the land and "dug out the basement for his house." He admits seeing a stake with a flag on it when he laid claim to the land, but says that he supposed that the claim had been abandoned. He also admits having a conversation with Annie Ray, but says that it was after he had made his filing; that she said a young man by the name of Slane staked the claim, but whether he ever was coming back she was sure she didn't know.

His brother, F. P. Long, corroborates as to there being no visible improvements, and nothing but a flag on the land at the date of their inspection about the 18th or 19th of October, 1893.

George W. Bennett, a surveyor and locator, examined the tract on the west line where Slane claimed to have cleared about two and one-half acres, and says there was no noticeable evidence of such clearing or trimming of trees; that the "country there looked just the same as all the rest of it; didn't have any appearance of having any work done;" that he didn't see any ax marks on the trees, but that he, Lane, might have trimmed some trees, but not in sufficient numbers to be noticeable.

The hole that he dug in the creek bed cannot be considered as an improvement, for he admits himself that the first high water obliterated

it, and it is clear that it was only for temporary use. The only thing claimed to have been done by him during the four days after the opening, having the character of a permanent improvement, was the trimming of trees, and if he trimmed any they were so few as not to be noticeable by witnesses who examined the land and examined it for the purpose of ascertaining if there were any marks of settlement. A stake with a flag on it is a device commonly used at the opening to indicate the arrival on and claim to the land by the party erecting it, as against competing settlers on the day of the opening, and will not be available as against subsequent settlers if not followed up within a reasonable time by additional acts evidencing an intention to make a *bona fide* settlement. Frazier *et al. v.* Taylor (24 L. D., 358).

While it might be held that the leaving the stake and flag on the land, as shown in evidence, would be sufficient to hold the claim for a few days, while the claimant could without unnecessary delay procure the necessary appliances for making and continuing actual settlement, it is believed that this would be the utmost limit to which such act would serve to protect his rights. The record in this case shows, however, that the contestant remained away from the land nearly two months, for at least twenty days of which time he offers no excuse, and during all of which time there was no noticeable evidence of his alleged claim to the land except a stake and flag. The evidence shows that Slane is a young man, twenty-seven years old, unencumbered with a family, and no excuse is given for not commencing his improvements sooner than he did.

It is shown in evidence that while he remained on the land directly after the opening, he was idle and living at the expense of the settlers for a greater part of the time, and altogether his conduct is not calculated to impress the Department very favorably. On the other hand, Mr. Long, the entryman, has a wife and three children, his improvements are superior to those of Slane, and he is shown to have lived up to all the requirements of the law in residence and improvements. The fact that there was a flag and stake on the land and that he knew it at the time he made application to enter it, is not regarded as an evidence of bad faith, because at that time more than a month had elapsed since the opening and he might reasonably believe, as he says he did, that the claim had been abandoned.

The case of Hunter *v.* Blodgett, 20 L. D., 452, cited in your office opinion, and which seems to have been chiefly relied on to sustain this contest, is not considered pertinent to the issue here involved. In that case four small stakes were set to mark the corners of a foundation for a house, which was a veritable act of settlement, and but two days elapsed between this act of Blodgett and the settlement of Hunter, and the only question was as to the sufficiency of the four small stakes to impart notice of Blodgett's settlement. They were held to be insufficient, inasmuch as Hunter claims not to have seen them when

she made settlement. The question here at issue is whether a stake of any size set to mark his arrival in the race, without other visible acts of settlement, is sufficient to hold the land for weeks as against the settlement of a subsequent claimant.

The decision appealed from is reversed, the contest dismissed, and the entry of Long is held intact.

RAILROAD GRANT—INDEMNITY SELECTION—ADVERSE CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* DEAN ET AL.*

A railroad indemnity selection admitted of record at the local office at a time when the land selected was embraced within a pending application for the right of entry, and allowed to stand subject to the completion of said application, is a bar to other disposition of the land, if such uncompleted application is subsequently abandoned.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1896.

(W. V. D.) (F. W. C.)

I have considered the appeal by the Northern Pacific Railroad Company from your office decision of September 24, 1895, holding for cancellation its indemnity list No. 9, presented June 5, 1885, as to certain tracts covered by the applications of Peter Dean and others.

These applications were tendered in February, 1884, and rejected by the local officers for conflict with the indemnity withdrawal made on account of the grant for said company.

The applicants appealed. Thereafter, to wit, on June 5, 1885, the company made selection of the lands.

It having been held that the indemnity withdrawal ordered on account of this grant was in violation of law (Northern Pacific R. R. Co. *v.* Miller, 7 L. D., 100) your office in considering the appeals by Peter Dean and others held that their applications were improperly rejected, which holding was sustained by departmental decision of March 11, 1895 (not reported).

Said decision directed that "they (the applicants) will therefore be notified of their right to complete their filings upon their applications heretofore presented and thereupon the company's selections will be canceled."

This direction was at first construed by your office to hold the company's selections subject to the right of the applicants named to complete their filings, and the local officers were, by your office letter of June 26, 1895, directed to notify the applicants that they would be allowed thirty days in which to complete their filings.

From the reports made by the local officers in August, 1895, it appears that, although duly notified, none of the twenty-seven appli-

* Not reported in volume current with decision.

cants named responded to the notice, thus evidencing that they had abandoned their applications.

Notwithstanding these reports, your office decision of September 24, 1895, held the company's selections for cancellation, with a view to recognizing applications tendered by other persons since the company's selection of the lands, basing their action upon the decision made in the case of Southern Pacific R. R. Co. (21 L. D., 423), wherein it was said:

> The lands within the primary and indemnity limits are both granted, the particular difference between the two being the time of the attachment of rights. Within the primary limits the company's right attaches upon definite location, while within indemnity limits it does not attach until selection. But any claims that would serve to prevent the attachment of rights under the grant to a tract within the primary limits, because existing at the date of definite location, would, by parity of reasoning, if existing at the date of selection of indemnity land, serve as a bar to the acceptance of such selection.

While adhering to the views thus quoted, a further distinction might be pointed out between lands within the primary and indemnity limits, *i. e.*, that the former, when once excepted from the grant, remain in that condition, whereas, as to the latter, the status of the land at the date of selection determines the company's right at that date only. That is to say, indemnity lands are subject to selection at any time when they are free.

It must be remembered that the company's selection of the lands here involved was approved by the local officers and allowed to go to record, and the only effect of the decision of March 11, 1895, was to hold said selections to be subject to the completion of the applications by Peter Dean and others, presented prior to said selection.

It would be inequitable as well as illegal to hold that a mere application to file, never completed, and under which no right is now being asserted, served to reserve the land, and thereby invalidate a selection of the land, in all respects regular as far as shown by the record before me, to the end that applications presented at a date subsequent to the selection of the land might take precedence over the selections.

The applications presented prior to selection have been abandoned, whether before or after selection is not material, suffice it to say that upon the showing now before me it must be held that said applications are no bar to the company's selection.

Your office decision is therefore reversed, and the company's selection list of June 5, 1885, will be respected unless other and sufficient reason appears for disregarding the same.

RAILROAD GRANT—INDEMNITY SELECTION—ADVERSE CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* FLY.

If the local officers erroneously allow a railroad indemnity selection to go of record during the pendency of a prior adverse claim, it is within the authority of the Secretary of the Interior to permit such selection to stand, and to give it his final approval upon the subsequent abandonment or other elimination of the adverse claim.

The case of Northern Pacific R. R. Co. *v.* Loomis, 21 L. D., 395, overruled.

Secretary Bliss to the Commissioner of the General Land Office, September 28, 1898.

(W. V. D.) (F. W. C.)

Calvin H. Fly has appealed from the decision of your office, dated May 17, 1895, holding for cancellation his homestead entry covering the N. ½ of the SE. ¼ of Sec. 11, T. 16 N., R. 44 E., Walla Walla land district, Washington.

The land described is within the indemnity limits of the grant to the Northern Pacific Railroad company and was covered by an indemnity selection which the local officers allowed to go of record March 20, 1884.

Prior to the presentation of such selection, one J. H. Kincaid tendered a timber culture application for this land, which application was, by the local officers, rejected for conflict with the indemnity withdrawal made on account of this grant, the withdrawal being then recognized, but since held to be void and of no effect.

Upon appeal your office reversed the action of the local officers and the company appealed to this Department, the matter being considered in departmental decision of August 11, 1894 (not reported), in which it was held that, "upon completion of entry by Kincaid, the company's selection will be canceled."

It now appears that, although duly notified, Kincaid failed to complete his timber culture entry, and on March 11, 1895, the local officers permitted Fly to make homestead entry of the land.

The decision of your office now under review held this action to be erroneous and therefore held said entry for cancellation and permitted the company's selection to remain intact.

From this action Fly appeals, and in the appeal urges that the company's rights under its selection must be determined by the condition of the land at the date of the presentation of its list, and as Kincaid's application was then pending upon appeal and undetermined, the selection is invalid and is no bar to the allowance of his (Fly's) entry.

This contention finds support in departmental decision in the case of Northern Pacific R. R. Co. *v.* Loomis *et al.* (21 L. D., 395), in which it was held (syllabus):

The status of a tract of land at the date of its selection determines the right of the company thereunder; and, if at such time there exists an adverse claim sufficient to bar said selection, the subsequent abandonment of said adverse claim can not inure to the benefit of the company under its selection so made.

In the more recent case of Northern Pacific R. R. Co. *v.* Peter Dean *et al.* (27 L. D., 462), the same question was presented and therein it was held—

> It must be remembered that the company's selection of the lands here involved was approved by the local officers and allowed to go to record, and the only effect of the decision of March 11, 1895, was to hold said selections to be subject to the completion of the application by Peter Dean and others, presented prior to said selection.
>
> It would be inequitable as well as illogical to hold that a mere application to file, never completed, and under which no right is now being asserted, served to reserve the land, and thereby invalidated a selection of the land, in all respects regular as far as shown by the record before me, to the end that applications presented at a date subsequent to the selection of the land might take precedence over the selections.
>
> The applications presented prior to selection have been abandoned, whether before or after selection is not material, suffice it to say that upon the showing now before me it must be held that said applications are no bar to the company's selection.

After a careful examination of the matter I must adhere to the latter ruling, which seems to conform to the general practice of this Department in instances where a homestead or other application is irregularly allowed to go of record during the pendency of a prior adverse application which is subsequently abandoned or otherwise eliminated.

Counsel for Fly, in the argument of the case, refers to several decisions of the supreme court in which it is held that the condition of the land at the date of the passage of the act making the grant, or the definite location of the road, determines the company's rights under the grant, even though the condition is afterwards changed, that is, if at the date of the act or at the time of definite location, the land is embraced in a homestead entry, it is not passed by the grant, even though the entryman thereafter abandons the land.

These cases, however, all involve lands within the primary or granted limits, and if, for any reason, a tract within these limits does not pass because of a claim thereto existing at the time of the attachment of rights under the grant, the same is forever excepted and the company must look to its indemnity limits for a tract in lieu thereof.

Within the indemnity limits of the grants to aid in the construction of railroads, the rights of the grantee-claimant attach only upon selection, and such selection may be made at any time when the land is free. The fact that such land is at one time not free and therefore not then subject to selection, does not preclude its subsequent selection. For administrative reasons it is deemed better that an indemnity selection proffered or tendered for land which is not free at the time should be rejected by the local officers, but this is a matter within the control of the Secretary, under whose direction the selections must be made. In many instances the prescribed practice requiring a rejection of selections proffered or tendered for land included in an existing adverse claim, was departed from by the local officers and the selections allowed to go of record notwithstanding such prior adverse claim, and this action of the local officers was acquiesced in by your office and by the department to the extent of permitting the selection to stand of

record subject to the perfection of the adverse claim. The case at bar is one of this class and in departmental decision of August 11, 1894, it was held, as before stated, that "upon completion of entry by Kincaid, the company's selection will be canceled." While not amounting to an approval of the selection, this was, in effect, an order permitting the selection to stand, saving only the rights of Kincaid, the prior adverse claimant; that is, it was a direction that should Kincaid fail to complete entry of the land, the selection already allowed to go of record, would be recognized, if no other objection thereto appeared upon further examination. The reason for this action grew out of the fact that many years had elapsed since Kincaid had tendered his application, and it might have been that he had abandoned his claim to the land, or was otherwise unable to complete the same.

This in nowise affects the holding that the status of the land at the date of proffering or tendering selection, should control the action of the local officers in rejecting the same or allowing it to go of record, but where, contrary to the practice adopted in the administration of these land grants, the local officers erroneously allow a railroad indemnity selection to go of record during the pendency of a prior adverse claim, it is within the authority of the Secretary to permit such selection to stand, and to give it his final approval upon the subsequent abandonment or other elimination of the adverse claim. This results from the fact that a railroad indemnity selection does not become finally effective until approved by the Secretary, and if at that time the land is free and the company is entitled to the indemnity, the fact that there was an adverse claim to the land when the selection was proffered or tendered constitutes no legal obstacle to the Secretary's approval under the law.

For the reason here given, the case of Northern Pacific R. R. Co. *v.* Loomis *et al.*, *supra*, will no longer be followed.

In the present case, Kincaid gained no such right by the tender of his application as could be transferred to another, and if Fly secured his waiver he did not succeed to his claim.

Other questions are raised by the appeal: (1) as to whether lands within the Yakima Indian reservation will support an indemnity selection; and (2) as to the effect of rearrangement of the losses assigned as bases for the selections; but these questions have been fixed by the repeated rulings of this Department. Dellone *v.* Northern Pacific R. R. Co., 16 L. D., 229; O'Brien *v.* Northern Pacific R. R. Co., 22 L. D., 135.)

So far, therefore, as shown by the record before me, the company's selection was, at the date of Fly's entry, an appropriation of the land.

The facts of this case bring it within the provisions of the act of July 1, 1898 (30 Stat., 621), and you will therefore notify Calvin H. Fly, the claimant against said railroad company, of his right to transfer his claim to other lands in lieu thereof, as therein provided; and in the

event he declines this option the railroad company will, under the provisions of said act, be duly invited to relinquish the land herein claimed and to select other lands in lieu thereof.

With these modifications, your office decision is affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—ADVERSE CLAIM.

DUNNIGAN *v.* NORTHERN PACIFIC R. R. CO.

The authority of the Secretary of the Interior over the selection of indemnity lands is not to be exercised arbitrarily, but is sufficient to enable him to protect a qualified settler who has placed valuable improvements on a tract, and is residing thereon, with intent to secure title by compliance with the public land laws, at the time an indemnity selection is tendered, even though such settler may have failed to make timely filing or entry prior to the proffer of the company's selection.

This privilege however, which should be thus accorded to one who has settled on a tract prior to the offer of an indemnity selection therefor, is personal to such settler, and not transferable; hence, a purchaser of the possessory claim and improvements of such settler, does not by such purchase strengthen the position resulting from his own settlement on the land, or other initiation of claim thereto, after such selection is noted of record.

Secretary Bliss to the Commissioner of the General Land Office, September (W. V. D.) 28, 1898. (F. W. C.)

An appeal has been taken on behalf of Patrick J. Dunnigan from your office decision of August 15, 1896, rejecting his application to file pre-emption declaratory statement for the NE. ¼ of Sec. 13, T. 15 N., R. 43 E., W. M., Walla Walla land district, Washington, for conflict with the selection made of said tract by the Northern Pacific Railroad Company.

This tract was included within the limits of the withdrawal ordered upon the map of amended general route of the main line of the Northern Pacific Railroad, filed February 21, 1872, and upon the definite location of the road opposite thereto, as shown upon the map filed October 4, 1880, it fell within the indemnity limits.

Selection was made of the tract on account of the grant December 17, 1883, and a tract supposed to be within the limits of the Yakima Indian reservation was specified as the basis for such selection, the diagram on file and in use in your office showing the tract so specified as a basis to be within said Yakima Indian reservation.

This was the actual status of the land at the date Dunnigan tendered his pre-emption declaratory statement, to wit, on October 31, 1887, in support of which he alleged that the tract was not subject to selection by the railroad company

for the reason that said tract was settled on by one Theodore Buschman in the spring of 1881, and has been continuously occupied and cultivated ever since. That said Buschman died, while residing on the claim, in February, 1881, that affiant

purchased the improvements of said Buschman and made settlement thereon in February, 1884, and moved thereon March 1, 1884, and has resided thereon continously and cultivated the same ever since.

Upon said allegation hearing was duly ordered and held, at which it was shown that one D. S. Henry made the first improvement upon this tract, consisting of breaking, which was done in the spring of 1882. Later that spring Theodore Bussman (Buschman) had some breaking done upon the tract, and in the summer of that year began the construction of a house, which was soon thereafter completed, and in which Bussman resided until his death in the winter of 1884. He was a man without family, and worked a part of the time off the land. He made improvements consisting of a house, barn, twenty-five or thirty acres broken, and about one hundred acres enclosed with a fence. He does not appear to have ever applied to enter the land, and while it is alleged that he intended to make homestead entry thereof, it is not affirmatively shown that he was qualified to so enter the tract.

After his death Dunnigan purchased the improvement of the administrator, and has, since March, 1885, resided upon the tract and extended the improvements upon the tract, which at the date of the hearing were valued at $1,000.

Because it was not affirmatively shown that Bussman was a qualified settler at the date of the company's selection, a rehearing was ordered by your office, but the showing made at said rehearing failed to establish the fact that Bussman was qualified to enter the land under the settlement laws, and for that reason your office decision appealed from rejected Dunnigan's application and held the company's selection intact.

A review of the record clearly justifies the action of your office in rejecting Dunnigan's application, but the order for a rehearing was unnecessary, for had Bussman been shown to have been a qualified settler at the date of the proffer of selection by the company, it would not have benefited Dunnigan.

Within the indemnity limits title does not pass except upon the approval of the selection by the Secretary of the Interior.

The act making the grant provides (13 Stat., 365):

> And whenever, prior to said time [definite location] any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

In the case of a similar grant of indemnity lands, the court said in Wisconsin Central R. R. Co. *v.* Price County (133 U. S. 496, 512, 513):

> Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United

States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

The uniform language is, that no title to indemnity lands becomes vested in any company or in the State until the selections are made: and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior.

The authority of the Secretary of the Interior over the selection of indemnity lands by the company is not to be exercised arbitrarily, but is sufficient to enable him to protect one possessing the requisite qualifications, who with intent to acquire title thereto by compliance with the public land laws, has made settlement and placed valuable improvements upon a tract of land and is occupying and residing upon the same in pursuance and execution of such intention at the time when the company's indemnity selection is proffered or tendered; and notwithstanding the selection made by the company the Secretary may withhold his approval thereof and permit such *bona fide* settler to file the necessary papers and make due proof and payment, where payment is required, and thereby acquire title to the land, even though the settler had failed to make a timely filing or entry before the proffer or tender of the company's selection. The privilege which may and should be thus accorded to the settler is personal to him, because no transferable right is acquired by settlement, inhabitancy, occupation, cultivation or improvement of the public lands, and therefore one who, after a railroad indemnity selection has been proffered or tendered and regularly noted of record in the local office, purchases the possessory claim and improvements of another, does not thereby strengthen the position resulting from his settlement upon the land or other initiation of claim thereto after such selection was so noted of record. He would be acting with full knowledge of the selection and his rights would be subordinate to the inchoate claim of the company thereunder. It follows, therefore, that the rehearing had in this case was unnecessary.

It might be noted that at the date of the tender of Dunnigan's application the basis assigned by the company for the selection of the tract here in question was of land shown by the diagram on file and in use in your office to be within the Yakima Indian reservation, but which by subsequent survey was shown to be without said reservation and therefore not a proper basis. Within a reasonable time, however, after this fact was developed by the survey, the company specified another and sufficient basis for its selection. Its right is therefore protected under its original selection as against an intervening adverse claim. (Kauffman *v.* Northern Pacific R. R. Co., 27 L. D., 133.)

The facts of this case bring it within the provisions of the act of July 1, 1898 (30 Stat., 621), and you will therefore notify Patrick J. Dunnigan, the claimant against said railroad company, of his right to transfer his claim to other lands in lieu thereof, as therein provided: and in the

event he declines this option the railroad company will, under the provisions of said act, be duly invited to relinquish the land herein claimed and to select other lands in lieu thereof.

With the papers transmitted is an appeal by one Fred B. Rogers from the action of the land officers rejecting, for conflict with the company's selection, his homestead application covering the tract here under consideration. Said appeal was not considered in your office decision of August 15, 1896, and for that reason need not now be considered by the Department.

With these modifications, your office decision is affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—ADVERSE CLAIM.

SOUTHERN PACIFIC R. R. CO. *v.* CHERRY.

A railroad indemnity selection regularly allowed to go of record in the local office under the rulings then in force, should not be canceled without affording the company due opportunity to be heard.

The pendency of a motion for the reconsideration of adverse action taken on an indemnity selection bars the allowance of an entry of the land involved until final disposition of the question so raised.

The cases of Dunnigan *v.* Northern Pacific R. R. Co., 27 L. D., 467; and Northern Pacific R. R. Co. *v.* Fly, 27 L. D., 464, cited and followed.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *September 30, 1898.* (F. W. C.)

The Southern Pacific Railroad Company has appealed from your office decision of October 15, 1896, denying its petition for the reinstatement of its selection covering the N. ½ of the SE. ¼ and the SE. ¼ of the SE. ¼ of Sec. 11, T. 14 S., R. 25 E., Visalia land district, California.

This tract is within the indemnity limits of the grant for said company on its main line and was included in a list of selections filed August 20, 1883.

Prior to said selection, to wit, May 11, 1876, one Mary J. Collins filed preemption declaratory statement No. 6153, covering this land, which filing was never perfected into an entry but had not been formally canceled upon the records of the local office at the date of the company's selection.

Under the rulings of the land department in force, however, at the date of said selection, such a filing was no bar thereto. Following the circular of November 7, 1879, regulating the adjustment of railroad grants, it was uniformly held at that time that the record entry of a preemption filing was not in itself sufficient to prevent the attachment of rights under a railroad grant, either by definite location of the road, or by selection of indemnity lands.

With your office letter "F" of July 11, 1895, was submitted for approval, as the basis for patent, clear list No. 24, prepared by your

office from selections made by the company, said list covering 1,144.40 acres, including the tract in question. In the certificate attached to said list your office stated that the lands are "free from adverse claim save for certain expired declaratory statements covering them etc."

Under the view, at that time taken by the Department, of the decision of the supreme court in the case of Whitney *v.* Taylor (158 U. S., 85), the list was returned by departmental communication of August 3, 1895 (21 L. D., 423), without approval. No order for cancellation of said selections was given, because the company had not been heard. It appears, however, that by your office letter "F" of August 14, 1895, the local officers were directed to cancel the selections covered by said list and to call upon Collins, the preemptor here concerned, to come forward and perfect claim under her filing within sixty days, failing in which the same would be canceled.

September 12, 1895, a motion was filed on behalf of the company, for reconsideration of so much of your office letter of August 14, 1895, as ordered the cancellation of its selections. No action appears to have been taken upon said motion, and on September 14, 1895, the company filed a motion for review of the departmental action in refusing to approve the list. This latter motion was forwarded to this Department by your office letter "F" of October 5, 1895, but the local officers do not appear to have been advised of the filing of said motion, so that on December 30, 1895, they permitted Columbus F. Cherry to make homestead entry of this land.

The motion for review of the departmental action was considered, and in a communication of May 26, 1896, the Department directed your office to cause cancellation to be made of all expired preemption filings embracing land included in the company's list of selections. Action looking to this end had already been taken in your office letter of August 14, 1895, before referred to.

Upon the report from the local officers to the effect that the preemptors whose claims conflicted with list No. 24, had been notified and failed to respond, your office, by letter of June 11, 1896, ordered these filings to be canceled and the railroad selections to be reinstated so far as the lands then appeared to be free from adverse claims. A new clear list of said lands was submitted for approval June 19, 1896, and approved July 25, 1896.

On account of the entry of Cherry, made, as before stated, on December 30, 1895, the company's selection was not ordered reinstated as to the tract in question, and on September 16, 1896, the company petitioned for the cancellation of said entry and the reinstatement of its selection covering said tract. This was denied in your office letter of October 15, 1896, from which action the company has appealed to this Department.

From the above recitation it is apparent:—

First: That the company's selection was regularly allowed to go of record in the local office under the rulings then in force.

Second: That the action taken in your office letter of August 14, 1895, canceling the said selections, was not warranted under the decision of August 3, 1895 (*supra*), refusing to approve the list submitted and consequently should not have been taken without affording the company an opportunity to appeal.

Third: That the motion for reconsideration of the action of your office, and the motion for review of the action of this Department in refusing to approve the list as submitted, were pending at the date of the allowance of Cherry's entry, and under repeated decisions barred disposition of the lands until finally disposed of. (Asahel Russell, 12 L. D., 529; Arthur Gentzler *et al.*, 13 L. D., 429; Cole *v.* Northern Pacific R. R. Co., 17 L. D., 8.)

It follows, therefore, that, as the company does not appear to have been guilty of laches, its selection of the tract in question, must be considered as still of record, and Cherry's entry must be canceled.

In connection with the ruling herein, reference is had to the cases of Patrick J. Dunnigan *v.* Northern Pacific R. R. Co. (27 L. D., 467), and Northern Pacific R. R. Co. *v.* Calvin H. Fly (27 L. D., 464).

This disposes of Cherry's claim as far as shown by the record, and unless other reason appears, the tract will be submitted for approval on account of the grant.

CENTRAL PACIFIC R. R. CO. *v.* HUNSAKER.

Motion for review of departmental decision of August 2, 1898, 27 L. D., 297, denied by Secretary Bliss, September 28, 1898.

FOREST RESERVATION—RELINQUISHED CLAIM—ACT OF JUNE 4, 1897.

F. A. HYDE.

Unsurveyed land can not be taken, under the act of June 4, 1897, in lieu of a relinquished claim within a forest reservation.

Secretary Bliss to the Commissioner of the General Land Office, September 28, 1898. (W. V. D.) (E. F. B.)

On December 24, 1897, F. A. Hyde, as assignee of Joseph William Belden, filed in the local office at Marysville, California, an application to select an unsurveyed island in the Sacramento River said to contain seventy-seven (77) acres, in lieu of the N. ½ of the NE. ¼ of Sec. 16, T. 13 S., R. 31 E., M. D. M., Marysville, California, which is embraced in the Sierra forest reserve, to which he claims title by purchase from the State as school land in place.

Said application was filed under the act of June 4, 1897 (30 Stat., 34), which provides for the survey and protection of the forest reservation

set apart by Executive proclamation under the act of March 3, 1891, and declares—

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims

You rejected said application for the reason that the assignment of a right to select lieu land is not recognized by said act.

Since your decision was rendered, Belden, the assignor of Hyde, has filed an application to select said land, alleging ownership of said tract within the forest reservation, which he has relinquished under the provisions of said act of June 4, 1897, for the purpose of selecting lands in lieu thereof, and that the application of Hyde was made by his direction and for his benefit. This application was filed through Hyde, as attorney, and the case may therefore be considered as pending before the Department upon the application of Belden, the owner of the tract within the forest reservation.

Under the express terms of the act the owner of a tract of land within a forest reserve, whether he holds the title directly from the government or by mesne conveyances through others, may relinquish the title to the government and select in lieu thereof a tract of vacant public land open to settlement, not exceeding in area the tract covered by his claim or patent. The patent to the land so selected should be issued in the name of the owner of the tract relinquished, at the date of the relinquishment.

But the application here made should be rejected for the reason that the land selected is unsurveyed.

The general rule is, that no portion of the public domain is subject to disposal until after survey, and this rule must control the action of the executive department in every case, unless the particular statute or authority under which the land is disposed of expressly authorizes the selection or disposal of unsurveyed lands, as in the case of a grant of a specific tract or body, or where the law providing for the issuance of certain scrip expressly authorizes the location of it either on surveyed or unsurveyed lands.

The application is therefore rejected.

STATE SELECTIONS—CERTIFICATION—RELINQUISHMENT.

STATE OF MONTANA.

The certification to the State of lands selected under the act of February 22, 1888, is the equivalent of a patent thereto, operating to terminate the jurisdiction of the Land Department over the lands thus certified; and after such certification there is no authority in the Department to accept a reconveyance of said lands, with a view to allowing the State to make other selections in lieu thereof.

As to unapproved selections under said act, the Department may, on good cause shown, permit the State, through its duly authorized officers, to relinquish its claim, with a view to making other selections in lieu thereof, such relinquishment to be accompanied by due showing that none of the land so relinquished has been disposed of or encumbered by the State.

Secretary Bliss to the Commissioner of the General Land Office. September 28, 1898.
(W. V. D.)

On October 5, 1897, the State of Montana, by H. D. Moore, register of the land office of said State, made an application, approved by Robert B. Smith, governor and president of the State board of land commissioners, to this Department, to be permitted to relinquish certain lands heretofore selected under its several grants for State purposes, and to select other lands in lieu thereof.

In support of this application, it was said:

We find upon careful examination that a large percentage of the lands heretofore selected by the State for educational purposes, etc., under its original grant, were either selected without due investigation or were selected in view of certain proposed irrigation schemes, which failed to be carried out; the result being that the educational institutions of the State have large tracts of land which will not yield any revenue for a long time to come, and their usefulness will be greatly impaired in consequence thereof.

If the selections heretofore filed, both the approved and those awaiting approval, could be amended by eliminating tracts of land which are worthless under present conditions, and the State be permitted to select other lands in lieu thereof, the various State institutions would (be) benefited greatly for all time to come: as lands capable of producing a revenue could be selected therefor; and the lands so relinquished could, in most instances, be selected by our arid land commission under the "Carey" act, and be made subject to the laws providing for the reclamation of arid lands. As it is, these lands now simply stand in the way of anything being done for the lands in their vicinity, and, far from being any benefit to the State, are a hindrance to the natural development of the institutions to which the lands belong and which the lands were intended to help maintain.

We would therefore respectfully ask to be permitted to amend the lists of selections heretofore filed, both those approved, and those awaiting approval, by relinquishing certain lands included in said lists.

This application was referred to your office for report, and on March 1, 1898, a report was made, wherein it was set out that the act of February 22, 1888 (25 Stat., 676), granted to the State of Montana lands aggregating 668,080.00 acres for public buildings, universities, agricultural colleges, and internal improvements, and that selections have

been made to the amount of more than 379,000.00, of which 292,120.51 acres have been approved and certified to the State.

On March 4, 1898, by departmental letter to the aforesaid H. D. Moore, the application of the State was denied, for administrative reasons, and, further, as to those lands embraced in approved selections, it was questioned whether, under the constitution of the State of Montana, a reconveyance could be made to the United States.

The Department is now in receipt of your office report of May 6, 1898, upon the communication of Donald Bradford, vice-chairman of the State arid land commission, of Montana, asking a reconsideration of the Department's said decision of March 4, 1898.

The opinion of the attorney-general for the State, to the effect that authority exists in the board of land commissioners to make the desired exchange of lands with the United States, accompanies the application for reconsideration.

It will not be necessary to give further consideration to the question of the authority of the representatives of the State, either inherent or statutory, to reconvey to the United States those lands the title to which is now in the State. This class embraces all of the lands, the selection of which by the State on account of its several grants has been approved by the Secretary of the Interior, and the lands duly certified to the State. This certification is the equivalent of a patent and, as the final act of the land department in administering the grant, terminates the jurisdiction of the Department over the lands embraced therein.

In the absence of express statutory provision, or of powers necessarily incident to the general supervision of the Secretary of the Interior over the public domain, no authority exists in the land department to accept a reconveyance of these lands. No statute is cited, and none has been found, giving such authority, and it is not believed that it has ever been exercised in a case like this. In the absence of special authority in some form, the acceptance by the land department of a surrender of title to the government is usually confined to cases where the facts are such as to warrant judicial proceedings for the recovery of title. Where patent has issued through accident, fraud or mistake, the Department can always accept a reconveyance by way of a restoration of title which ought not to have been conveyed and which therefore ought to be restored.

Where the government has conveyed the title to a large body of public lands to a State there is more or less the possibility that rights have been acquired by others under such title which it is necessarily difficult for the government to ascertain, and to permit the reconveyance of such lands for the purpose of making a selection of other lands in lieu thereof would be calculated to involve the United States in difficulties which ought to be avoided.

As to those lands which have been selected by the State and which

are embraced in unapproved and pending lists, the land department has full control and can permit the State, through its duly authorized officers, to relinquish its claim under its unapproved selections and, in this instance, upon a full consideration of the showing made, it is directed that the State be permitted to relinquish, within a reasonable time, to be fixed by your office, any of the lands embraced in the pending unapproved lists, and that after such relinquishment the State be permitted to select other lands as though the lands so relinquished had never been selected. With the relinquishment should be filed evidence, deemed satisfactory by your office, to the effect that none of the land thereby relinquished has been encumbered, sold or disposed of, or contracted or agreed by the State to be encumbered, sold or disposed of, and a relinquishment which is not accompanied by such evidence will not be accepted or given any effect. This requirement is not made on the assumption that the State can, before approval of its selection, lawfully do anything which will affect the title as against the United States but is made in the exercise of a reasonable precaution and for the protection of any one who may have dealt with the State on the strength of the color of title given by the selection.

TIMBER CULTURE ENTRY—FINAL PROOF—WITNESSES.

MATTHIAS S. FEATHERSTONE.

The requirement that a timber culture entryman on the submission of final proof shall show compliance with the law by the testimony of two witnesses is statutory, and can not be waived; nor is the entry susceptible of equitable confirmation in the absence of such testimony.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 30, 1898.* (H. G.)

Matthias S. Featherstone appeals from the decision of your office of March 10, 1897, sustaining the action of the local office in rejecting his final proof offered on his timber culture entry made October 9, 1888, for the SE. ¼ of Sec. 33, T. 24 S., R. 20 E., Visalia, California.

The rejection of the local office was for the reason that the evidence of the claimant as to breaking, cultivation and planting of the tract entered is not corroborated by two witnesses, as required by law.

The local officers in rejecting such final proof, state in their report to your office, dated January 15, 1897, as follows:

We hereby reject said proof because the evidence of claimant as to breaking, cultivation and planting of the timber culture is not corroborated by two witnesses as required by law. In this connection, it may be well to state that we are of the opinion that the claimant has acted in entire good faith in regard to his entry and has endeavored to a greater extent probably than most timber culture entrymen in that vicinity, to comply with the law. From evidence adduced at this office on various occasions, and from our own personal observation and experience, we are satisfied

that the land in the vicinity of this entry, and in fact for a considerable extent on what is known as the "West Side," during parts of the year presents a very fertile and productive appearance, producing light grasses in abundance in ordinary years; that at first sight one would conclude that the land would produce anything for the planting, but that an experience of the last few years has taught the people that there is not enough rainfall in that vicinity to grow timber except during exceptionally wet winters, and that by reason of the dry climate and the difficulty in obtaining water for irrigation, most of the settlers have abandoned their lands as soon as possible after proof is submitted.

There is an irrigation district organized in that vicinity under what is known as the Wright law, but protracted litigation has prevented the consummation of its plans and as yet the district has furnished no water. We think this case is a fit one for equitable action, and respectfully suggest and recommend that it be referred to the board of equitable adjudication.

Upon appeal to your office, it was conceded by the entryman that the acts of cultivation, plowing and planting are not proven by two witnesses, as required by law. It was contended, however, that it was impossible to furnish the requisite proof. This was shown by the affidavit of the entryman, who states that the land is situated on the southwest end of Tulare lake, in a sparsely settled region. The claimant states that he has had great difficulty in obtaining any witnesses who had any knowledge of the tract covered by his entry and of his work upon the claim. As to his labors upon the claim for a series of years, he has no witnesses to substantiate his testimony. The corroborative evidence relates to his work upon the claim for the first year succeeding his entry and for the seventh and eighth years of the entry. During the two years last mentioned, he planted ten acres to black locust tree seeds. These seeds did not germinate, owing to the extreme drought in the neighborhood of the land. There were no means of artificial irrigation, although an irrigation district had been formed in the locality under what is known as the Wright law, but no further steps had been taken to secure water owing to the challenged constitutionality of that statute, and the consequent protracted litigation. It is admitted that there have been no trees produced upon the tract covered by the entry, notwithstanding the efforts of the entryman to secure a growth of trees thereon.

The timber culture act required a compliance with the requirements of the law to be shown by the testimony of two witnesses. While the unsuccessful efforts of the entryman to secure a growth of trees might be excused, as his testimony establishes his good faith, he makes no showing by two witnesses, as required by the statute, as to his labors on the tract for a series of years following his entry. This requirement of the statute can not be dispensed with, as it is mandatory and is essential to complete the final proof.

The rule invoked (Rule 31, Circular of the General Land Office 1895, p. 232; 10 L. D., 503) for the action of the board of equitable adjudication, does not apply to this case. It relates to defects and irregularities of form and not in matters of substance. In such case, the exist-

ing testimony must show a substantial compliance with the law, and even if this case fell within the rule, the *quantum* of the testimony is insufficient, as an attempted compliance with the law must be disclosed by the testimony of two witnesses.

The decision of your office rejecting the final proof is affirmed.

WAGON ROAD GRANT—LANDS EXCEPTED—OCCUPANCY CLAIM.

MARSHALL *v.* THE DALLES MILITARY WAGON ROAD CO.

Under the terms of the grant made by act of February 25, 1867, the occupancy of land at the date when the grant becomes effective does not except the land covered thereby from the operation of the grant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 30, 1898.* (C. J. W.)

The land in question is the E. ½ of the NW. ¼ of Sec. 7, T. 13 S., R. 34 E., Burns land district, Oregon, and is within the limits of the grant to the State for The Dalles Military Wagon Road, by virtue of the act of February 25, 1867 (14 Stat., 409), the right to which attached November 1, 1869.

It appears that John Lawrence made homestead entry for said tract January 14, 1870, and that the same was canceled November 7, 1890.

January 15, 1896, Joseph R. Marshall made homestead entry for the same tract. May 15, 1896, your office held said entry for cancellation, because of conflict with the right of The Dalles Military Wagon Road Company.

Before said decision was declared final, Marshall presented for the consideration of your office the statement that before and at the date (November 1, 1869,) when the company's grant took effect the tract in question was settled upon by John Lawrence, who was living upon and claiming it.

In view of said allegations, on August 6, 1896, your office recalled the decision of May 15, 1896, and directed a hearing for the purpose of ascertaining the status of said tract on said November 1, 1869.

Before any hearing was ordered, Marshall appealed from your office decision of May 15, 1896, which appeal was accompanied by a quitclaim deed for the land by the said Military Wagon Road Company to one Martin S. Nichols, dated September 3, 1872.

Your office, on August 19, 1896, returned said deed and appeal to the local office, without action, because of the previously directed hearing, but on August 28, 1896, your office directed the local office to suspend action under the order for a hearing and forward the company's deed covering the land to your office, and at the same time advised the local officers that it would simplify matters if Marshall, as assignee from the company, would obtain from the company a formal relinquishment of its claim to the United States. In response to this

suggestion, the company's deed to Nichols for said land was forwarded to your office, and the following facts were reported by the local officers:

1. That Marshall purchased the land from Nichols.

2. That he (Marshall) mortgaged the land, and the mortgage had been foreclosed and the land sold under a decree of court, and such title as the wagon road company had was now held by this purchaser under the decree, and that the land was in the possession of such purchaser, and the local officers suggested that a hearing be had, and that the claimant under the decree be made a party to the case.

Upon the basis of these reported facts, your office held, on January 21, 1897, that Marshall no longer appeared to be the holder of the grantee company's title, and that his rights were entirely dependent upon the validity of his entry, and that the alleged occupancy of the land by Lawrence prior to and on November 1, 1869, did not serve to except it from said grant, whereupon you held Marshall's entry for cancellation. From this decision he has appealed to the Department:

1. Upon the ground that your office erred in holding that the settlement and occupancy of Lawrence, existing prior to and at the date when the grant took effect, did not serve to except this tract from the grant.

2. That the reported state of facts as to the mortgage and its foreclosure is incorrect in this, that Dennis McAuliff, the alleged purchaser under the decree, lays no claim to this tract, and that it was at the instance of said McAuliff that Marshall made entry; that the mortgage referred to covered 274.27 acres, including the eighty acres in question; that McAuliff only considered himself the purchaser of the lands covered by the mortgage other than said eighty acres as to which he had conceded to him (Marshall) a superior right; that they had by agreement surveyed and separated the tracts, and that he (Marshall) had remained in undisputed possession of said eighty acres, and is still in possession of the land.

If your office committed no error in holding that the right of the company attached to the land in question on November 1, 1869, and was not excepted from its grant by the occupancy of Lawrence at that date, the second ground of error is not material, for if it be conceded that the right of the company attached on the definite location of the road, the entry of Marshall was erroneously allowed.

The grant to the State of Oregon for the benefit of The Dalles Military Wagon Road does not contain the usual reservation in favor of settlers, but the following:

> That any and all lands heretofore reserved to the United States or otherwise appropriated by act of Congress, or other competent authority, be and the same are hereby reserved from the operation of this act.

The act of the Legislative Assembly of the State, passed October 20, 1868 (Laws of Oregon, 1868, 3–5), granted to The Dalles Military

Wagon Road Company all lands granted to the State by the act of February 25, 1867, upon the same conditions and limitations contained in said act.

The mere occupancy of the tract in question by Lawrence at the date when the grant took effect did not operate to except it from the grant. It follows if this is correct, that The Dalles Military Road Company had a valid right to the land when the quitclaim deed was executed by it to Nichols, and said deed carried with it all the rights of said company to the tract, and the holder of the land under the deed is invested with the company's right.

Marshall is insisting that the company never had any right to the land, and therefore he may properly perfect his entry by making final proof, in compliance with the homestead laws, and obtain patent. The insistence is not well founded, and he must rely upon such title as he has as assignee of the grantee company.

Your office cites the case of Maddox *v.* Burnham (156 U. S., 544,) in support of the conclusion that the mere occupation of the tract on November 1, 1869, was not sufficient to except it from the operation of the grant, and the case seems to be in point.

Your office decision is accordingly affirmed.

OKLAHOMA LANDS—SETTLEMENT CLAIM—RESIDENCE.

UNITED STATES *v.* MAY (On Review).

One who secures a patent to land by alleged compliance with the settlement laws will not thereafter be heard to say, in support of another settlement claim covering the same period of time as the first, that in fact he did not actually reside on the patented tract.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 3, 1898.* (L. L. B.)

George W. May has moved a review of the case of the United States against said May (27 L. D., 243), in which it is insisted that, "in the light of the sworn statement now submitted," his entry should be sustained without the requirement of further residence.

His entry (homestead) embraces the NE. ¼ of the NE. ¼, Sec. 22, and the W. ½ of the NW. ¼ and the NW. ¼ of the SW. ¼, Sec. 23, T. 2 N., R. 1 E., Woodward, Oklahoma, and is situated in that part of Oklahoma known as the Public Land Strip, which was opened to settlement by the act of May 2, 1890 (26 Stat., 81). His entry was made December 18, 1894, and on June 20, 1895, he submitted final proof, and in his final proof testimony he alleged that he had never been absent from the land since the date of his settlement (1884), with the exception of the last twenty months. It appears, however, that in 1889 he made

pre-emption declaratory statement for 160 acres of land in New Mexico, upon which cash entry was allowed in June, 1891. From this fact and the further finding that he had not resided on the land in controversy since 1893, in the said decision now sought to be reviewed, it was held that his residence had not been continuous prior to his entry and that he was not entitled to a credit of two years' residence under the provisions of the 18th section of said act of May 2, 1890, and that in consequence he had not resided on the tract, as required by the homestead laws, for a period of five years at the date of his final proof.

The sworn statement upon which the review is based is in short to the effect that although he did make cash entry and receive final certificate June 1, 1891, on the land in New Mexico, he never actually resided upon his pre-emption land, but in fact always made his residence and headquarters on his said homestead entry, and that his patent to the land in New Mexico was received by him through the laches or default of the government.

It is not thought necessary to cite authorities in support of the maxim that no man may take advantage of his own wrong. May holds a patent to land acquired by residence and improvements made at the identical time he now claims residence on this entry. He will not be allowed to deny this presumptive residence, however wanting in fact it may have been, in order to show compliance with law on his homestead claim. The motion must be denied.

The decision complained of says that the land in controversy "was opened for settlement September 16, 1893, . . . under the provisions of the act of March 3, 1893 (27 Stat., 640)." This is a mistake. It was opened, as before said, by the act of May 2, 1890. With this modification, wherever such statement occurs, the decision is adhered to.

BYERS *v.* ALLISON.

Motion for review of departmental decision of July 26, 1898, 27 L. D., 277, denied by Acting Secretary Ryan, October 3, 1898.

CHIPPEWA HALF BREED SCRIP—LOCATION—PATENT.

CHARLES H. MOORE.

When questions once passed upon by the Department are again presented to the General Land Office in reliance upon decisions of the supreme court subsequently rendered, and apparently opposed to the departmental action, the Land Office should make report to the Department with such recommendation in the premises as may be deemed advisable.

The treaty of September 30, 1854, and the act of December 19, 1854, must be read together to ascertain the intention of Congress concerning lands that could be taken under Chippewa half breed scrip, issued under said treaty, and when so construed it clearly appears that such intention was to limit said selections or locations to the ceded territory, and that there is no authority for the selection, location or patenting of such half breed claims outside of said ceded lands.

A patent which by its terms discloses the fact of its issue under said treaty on a Chippewa half breed scrip location outside of said ceded territory is void on its face, an absolute nullity, and does not operate to pass the title to the land covered thereby out of the United States, or deprive the Land Department of its jurisdiction over said land.

A patent is void on its face not only when fatally defective by its own terms, but also, whenever its invalidity appears by reference to any matter of which judicial notice may be taken, such as public statutes or treaties; and such a patent is entirely null, conveys no title, and has no operative effect requiring resort to a court of equity for its avoidance.

The right of purchase accorded by the act of June 8, 1872, to holders under Chippewa half breed scrip locations is limited to locations made prior to the passage of said act.

The case of Charles H. Moore *et al.*, 16 L. D., 204, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 3, 1898.* (A. B. P.)

On February 9, 1874, Chippewa half-breed scrip No. 317, issued to Antonie La Pierre, was located upon the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼, Sec. 23, T. 1 N., R. 1 W., Salt Lake City, Utah; and at the same time Chippewa half-breed scrip No. 322, issued to Antonie Bagage, was located upon the S. ½ of the SE. ¼ of said section 23. These locations were made by a person representing himself as attorney in fact for the scrip claimants, and on January 25, 1875, patents were issued in the name of such claimants.

On August 22, 1888, Charles H. Moore applied to make homestead entry for said several tracts, but his application was rejected because of said scrip locations and patents. He appealed, urging that the scrip locations were unlawful and the patents issued thereon void on their face.

On July 31, 1890, your office, referring to the act of June 8, 1872 (17 Stat., 340; R. S. Sec. 2368), directed that the local officers ascertain who were the *bona fide* holders, if any, of the lands, with the view to allowing them to purchase under the said act, and that notice be given Moore and all other parties in interest, allowing them sixty days within which to take such action as they might deem proper.

This action by your office brought forth a showing to the effect that said lands had been subdivided into smaller tracts, and town lots, and that there were a large number of holders of such smaller tracts and lots—probably as many as one hundred. The holders tendered to the United States a surrender of the patents issued as aforesaid, accompanied by abstracts of title, a tender of the price of the land, and deeds reconveying the title to the United States.

On October 22, 1891, your office rejected Moore's application and held that the present holders of the lands in good faith, might perfect their titles by compliance with the provisions of said act of June 8, 1872.

Moore thereupon appealed, and on March 1, 1893 (16 L. D., 204), the Department held (syllabus):

The issuance of a patent for land which was a part of the public domain, or the fee to which was in the United States, *prima facie* passes the title, whether such patent may be valid, or voidable, and precludes the further exercise of departmental jurisdiction over the land until such patent may be surrendered, or vacated by judicial action.

The right of purchase accorded by the act of June 8, 1872, to holders under Chippewa half breed scrip locations is restricted to locations made prior to the passage of said act.

Your office was therefore directed to "return to said several claimants the deeds made by them, the abstracts of title, and the patents, ... in order that these applicants may be placed in *statu quo*."

No further action appears to have been taken by Moore until May 1, 1896, when he filed in your office his petition wherein he sets forth his former application and the action thereon by the Land Department; alleges that he made settlement August 18, 1888, with the intention of entering the land under the homestead law, and that "his improvements thereon ante-dated any made by other claimants, or occupants, and included the enclosure of forty acres or more with a post and wire fence;" refers to the decision of the supreme court of April 27, 1896, in the case of Fee *v.* Brown (162 U. S., 602), and asks, in view of that decision, that he be allowed to renew his application of August 22, 1888, and that the same be accepted, or that he be permitted to file a new application for the land.

On May 18, 1896, Moore filed in the local office his homestead application for said land, designating the same as a renewal of his application of May 18, 1888. This was rejected, and on June 3, 1896, he filed an appeal.

By decision of your office of May 27, 1896, Moore's said petition was denied, and by further decision of July 3, 1896, the action of the local office in rejecting his application of May 18, 1896, was affirmed. Both of said decisions are based upon the ground of lack of jurisdiction in your office to further deal with the land: (1) generally, because of the outstanding patents, and (2) because a former application by Moore, presented under similar conditions, for the same land, had been denied by this Department, whose right it is to determine whether a subsequent decision of the supreme court calls for a reversal of the action.

Moore has appealed.

It should be stated here that in view of said former departmental decision of March 1, 1893, the action of your office in declining to accept the present application of Moore, was entirely proper in any event. The Department having previously denied a similar application by the same party, for the same land, presented under similar con-

ditions, your office appropriately left to the Department the duty of determining whether the supreme court had subsequently rendered a decision announcing a ruling in conflict with the departmental decision on the subject, and requiring a recalling thereof. When questions once passed upon by the Department are again presented to your office in reliance upon decisions of the supreme court subsequently rendered and apparently opposed to the departmental action, your office should make report to the Department with such recommendation in the premises as may be deemed advisable.

The contention of the applicant Moore, as presented in his petition and appeal, is, in substance and effect, that the patents in question are void on their face; that no title passed thereby from the government; and that the land embraced therein is, therefore, still a part of the public domain, subject to disposition under the public land laws.

The patents refer to the treaty of September 30, 1854, with the Chippewa Indians (10 Stat., 1109), set forth the location of the scrip, and show that the lands are situated in Utah, then a Territory, but now a State. By the first article of the treaty referred to the Chippewas of Lake Superior ceded to the United States certain territory, theretofore held by them in common with the Chippewas of the Mississippi, the latter agreeing to such cession. By article 2, the United States agreed "to set apart and withhold from sale, for the use of the Chippewas of Lake Superior," certain tracts of land described in six paragraphs, all situated in the States of Michigan, Wisconsin and Minnesota. The seventh paragraph of article 2, provides that

> Each head of a family or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

Article 3 provides for the survey of the reserved tracts, and for the assignment in severalty, and issue of patent under certain prescribed conditions, to the parties entitled to the lands. The treaty on its face shows that no part of the ceded territory, including the reserved tracts, lay within, or anywhere near, the Territory of Utah. Subsequent articles provide the manner of payment for the lands by the United States, and of furnishing certain supplies to the Indians.

By act of December 19, 1854, (10 Stat., 598) passed by Congress apparently as a ratification of the treaty, and for the purpose of carrying the same into effect, the President was authorized to cause negotiations to be entered into with the Chippewa Indians for the relinquishment of their title to all the lands owned by them in Minnesota and Wisconsin, and it was directed that the treaties when made should contain, among others, the following provisions:

> First. Granting to each head of a family, in fee simple, a reservation of eighty acres of land, to be selected *in the territory ceded*, so soon as surveys shall be completed, by those entitled, which said reservations shall be patented by the President

of the United States, and the patent therefor shall expressly declare that the said lands shall not be alienated or leased by the reservees, or their heirs or legal representatives" etc.

* * * * * *

Third. And the benefits and privileges granted to said Indians shall be extended to and enjoyed by the mixed bloods belonging to or connected with the tribe, and who shall permanently reside on the ceded lands.

For the purpose of identifying the persons, who as mixed bloods, were, under the treaty, entitled to eighty acres each of the land, certificates were issued to such persons which became known as Chippewa half-breed scrip. On the face of these certificates it was stated that no "sale, transfer, mortgage, assignment or pledge, thereof" would be recognized by the United States. Notwithstanding this, however, they were made the subject of purchase and sale through the device of powers of attorney signed by the half-breeds, authorizing the location of the scrip, and the sale of the land when so located. Such locations were frequently made, as in the present cases, outside the territory ceded under the treaty. This evasive practice became so general that the attention of Congress was finally called to the matter. June 8, 1872 (17 Stat., 340), an act was passed for the relief of innocent parties holding in good faith under such illegal locations. Said act is as follows:

That the Secretary of the Interior be, and he is hereby, authorized to permit the purchase, with cash or military bounty-land warrants, of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September thirtieth, eighteen hundred and fifty-four, at such price per acre as the Secretary of the Interior shall deem equitable and proper, but not at a less price than one dollar and twenty-five cents per acre, and that owners and holders of such claims in good faith be also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned: *Provided*, That it shall be shown to the satisfaction of the Secretary of the Interior that said claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same.

The first question for consideration is what effect, if any, is to be given the patents issued to the half-breeds or mixed bloods in this case. As we have seen, these patents refer to the treaty and set forth the Chippewa certificates upon which they are based. They show that those certificates were located, not upon lands ceded by the treaty, but upon lands situated in the then Territory of Utah.

In the case of Fee *v.* Brown, *supra*, the question of the validity of a patent issued upon Chippewa half-breed scrip for lands located in the State of Colorado, under circumstances and conditions in all material respects similar to those of the present case, was considered and decided by the supreme court. In its opinion the court, after referring in some detail to the provisions of the treaty of 1854, and to the practice of issuing certificates thereunder to the half breeds or mixed

bloods, and the abuses connected with the use of such certificates, substantially as herein set forth, said:

We think it was probably intended that the power to locate this scrip should be confined to the territory ceded to the United States by the first article, although perhaps not to the tracts named in the first six paragraphs of the second article of the treaty of September 30, 1854. By this second article the United States agreed to set apart and withhold from sale for the use of the Chippewas of Lake Superior certain tracts of land, all of which were within the States of Michigan, Wisconsin and Minnesota, and in the same article, paragraph 7, provided that each head of a family or single person over 21 years of age, of mixed blood, should be entitled to eighty acres of land, to be selected by them under the direction of the President. By article 3 the boundaries of the tracts were to be determined by actual survey, and the President was authorized to assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use, and as fast as the occupants became capable of transacting their own affairs, to issue patents therefor to such occupants, with such restrictions upon the power of alienation as he might see fit to impose. There is some reason for saying that this article was intended to apply to Indians of pure, as distinguished from those of mixed blood. By subsequent articles the United States agreed to pay for the land ceded an annuity, and also a certain sum in agricultural implements, household furniture and cooking utensils, and also to furnish guns, rifles, beaver traps, ammunition and ready made clothing to be distributed among the young men of the nation, as well as to furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments. Article 7 provided against the manufacture, sale or use of spirituous liquors on any of the lands therein set apart for the residence of the Indians, and the sale of the same was prohibited in the territory thereby ceded until otherwise ordered by the President.

The whole scope and purpose of this treaty was evidently to induce the Chippewas to relinquish their claims to a large amount of territory theretofore owned by them, and to receive in lieu thereof a certain annuity, and also six tracts of land within the States above named, which were to be allotted, at the discretion of the President, in severalty, and in parcels of eighty acres each to heads of families and single persons over 21 years of age. If there were any doubt upon the question, arising from article 2, the subsequent articles indicate very clearly that the reserved tracts were intended to be for the actual residence of the Indians and were to be within the States above named.

The court then referred to the act of December 19, 1854, *supra*, and after stating that though subsequent in date to the treaty, it should be read in connection therewith, and be held to operate as a ratification thereof, further held as follows:

If there were doubts latent in the language of the treaty itself, it is clear from this act that it was the intention of Congress to limit the reservations to the territory ceded, both as applied to Indians of pure and mixed blood.

This was the distinct ruling of the supreme court of California in Parker *v.* Duff, 47 California, 554, 566, in which an attempt had been made to locate certain of this scrip in California, and we see no escape from that conclusion. It is also entirely clear that this scrip was intended to be located by the half-breeds themselves; that the patents were to be issued to the persons named therein, and that the right to alienate the lands was never intended to be given until the patents had been issued. It follows from this that the location of these lands in the State of Colorado gave no title to Brown, and that the patent issued thereon was void and of no effect.

In the case of Parker *v.* Duff (47 Cal. 566) cited with approval in Fee *v.* Brown, as just shown, certain of this scrip had not only been located in California, as stated by the court, but patent had issued thereon. The action was ejectment. On the trial the plaintiffs, relying for their title upon the patent, offered the same in evidence. The defendant objected on the ground that the patent was void on its face for want of authority in the officer who issued it. The lower court overruled the objection and admitted the patent as evidence. On appeal, however, the supreme court of the State reversed the ruling below and held the patent to be on its face void, and, therefore, of no operative effect as a muniment of title.

The question here under consideration is precisely the same as that decided in each of said cases of Fee *v.* Brown and Parker *v.* Duff, relative to the patents there involved. If, as held in those cases, the locations of Chippewa half-breed scrip in the States of Colorado and California, respectively, were without validity, and the patents issued thereon were void and of no effect, there would seem to be no escaping the conclusion that the attempted locations of the scrip in this case on lands in Utah, were equally invalid, and that the patents issued thereon are likewise void on their face and of no effect. The only authority for the issue of the patents is that contained in the treaty and the subsequent act of Congress ratifying the same. These, as said in Fee *v.* Brown, must be read in connection with each other, and so reading them, it clearly appears that the intention of Congress was to limit the half-breeds or mixed bloods in the selection of their lands, to the territory ceded. There is no authority for the selection, location or patenting of claims outside the ceded lands.

From this conclusion it seems necessarily to follow that no title passed by the patents, that the legal title is still in the United States, and that the lands are still a part of the public domain within the jurisdiction of the Land Department.

There is no necessity for resort to the courts, as suggested in the decision appealed from, for the purpose of setting aside and annulling the patents. A patent void on its face is an absolute nullity—a thing without force or effect for any purpose whatsoever. It furnishes no ground for a direct proceeding in the courts, to avoid it, but may be successfully assailed collaterally, whenever and wherever relied upon as evidence of title.

The principle appears to be well settled that the interference of a court of equity is not necessary in cases where the validity of a deed or other instrument of conveyance is apparent on its face. There is a clear distinction between this class of cases and those where such invalidity has to be shown by extrinsic evidence. Peirsoll *v.* Elliott, 6 Peters, 95; Phelps *v.* Harris, 101 U. S., 370–375; Mackall *v.* Casilear, 137 U. S., 550–564; Hughes *v.* United States, 4 Wall., 232.

In the cited case of Phelps *v.* Harris, the court, in its opinion, quoted with approval from Story's Eq. Jur. as follows:

> Where the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity, to direct it to be canceled or delivered up, would not seem to apply; for in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury.

In Hannewinkle *v.* Georgetown, 15 Wall., 547–8, the court in its opinion said:

> It has long been held, also, that there exists no cloud upon the title which justifies the interference of a court of equity, where the proceedings are void upon their face, that is, the same record which must be introduced to establish the title claimed, will show that there is no title.

It is the established doctrine of the federal courts, and also of the state courts in the absence of controlling local statutes, that a deed which is void on its face, is inoperative to give color of title in support of the bar of possession under statutes of limitation. In the case of Redfield *v.* Parks (132 U. S., 239–251) the supreme court speaking on this subject said:

> We think that both the weight of authority and sound principle are in favor of the proposition that when a deed founded on a sale for taxes is introduced in support of the bar of a possession under those statutes of limitations, it is of no avail if it can be seen upon its face and by its own terms that it is absolutely void.

In that case the deed recited a sale made on a day not authorized by law, and was held void on that account. A similar decision was made in the case of Moore *v.* Brown (11 How., 425).

In Walker *v.* Turner (9 Wheat., 541) it was held that a sheriff's deed void on its face is not such a conveyance as that possession under it will be protected by the statute of limitations.

In Polk's Lessee *v.* Wendal (9 Cranch, 87–99), after referring generally to the doctrine of equity jurisdiction in the matter of annulling and cancelling instruments of conveyance and other contracts, the court further said:

> But there are cases in which a grant is absolutely void; as where the State has no title to the thing granted; or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law.

And in Patterson *v.* Winn (11 Wheat., 380) the court speaking on the same subject said:

> We may therefore assume, as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it may be impeached collaterally in a court of law, in an action of ejectment.

The case of Morton *v.* Nebraska (21 Wall., 660) was an action of ejectment. The plaintiffs held a patent from the government, based upon the location of military bounty land warrants and certificates of

entry issued thereon, for certain lands in the State of Nebraska, which were disclosed by the records, at the time the proceedings in the Land Department were had, to be saline lands and therefore reserved from sale or other disposition as public lands. The defendants attacked the patent as void, and the State courts, both original and appellate, sustained the attack. The supreme court, in the course of its opinion affirming the judgment below, said:

It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law.

The case of Burfenning *v.* Chicago, St. Paul, Minneapolis etc. Ry. Co. (163 U. S., 321) was also an action at law. The plaintiff claimed title under a patent issued to a homestead entryman, for certain lands, which at the date of the patent and at the time of the initiation of the homestead claim, were situated within the limits of the city of Minneapolis, previously incorporated by public act of the legislature of Minnesota. The entry was illegal for the reason that the law (sections 2258 and 2289 U. S. Revised Statutes) excluded from pre emption and homestead "lands included within the limits of any incorporated town." The plaintiff insisted that the question of the patentability of all public lands was one for the Land Department to determine, and that its determination in the case, evidenced by the issue of the patent, was, in effect (and conclusively so), that the lands were not, at the date of the initiation of the patentee's rights, "within the limits of any incorporated town."

The court in its opinion, while expressly recognizing and adhering to the doctrine that questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final, further said:

But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, *transfer no title*, and may be challenged in an action at law. In other words, the action of the Land Department can not override the expressed will of Congress, or convey away public lands in disregard or defiance thereof.

The court then referred to and quoted approvingly from the case of Morton *v.* Nebraska, *supra*, and in speaking thereof used the following language:

In that case it will be observed that the records disclosed that the lands were saline lands when the proceedings in the Land Department were had. So the case was not one in which the Department determined *a fact upon parol evidence*, but one in which it acted in disregard of an established and recorded fact.

It was thereupon held, inasmuch as the city of Minneapolis had been incorporated by public act of the State legislature on March 8, 1881, of which judicial notice should be taken, and the record of the Land Department showed that the right of the patentee was not initiated until March 27, 1883, that the case was one where, affirmatively and by the record, it was disclosed that there was no pretense or semblance of claim on the part of the patentee until two years subsequent to the incorporation of the city, and that it therefore fell within the general rule announced as to the invalidity of a patent issued in defiance of the expressed will of Congress.

The case of Deweese *v.* Reinhard (165 U. S., 386) was a bill in equity filed for the purpose of quieting title in the plaintiff to certain lands in the State of Nebraska, and to restrain further proceedings in an action of ejectment between the same parties, on the ground that the plaintiff in that action (the defendant in the bill) rested his title upon the selection of the lands by, and the certification thereof to the State, under a grant of internal improvements; which selection and certification were alleged to be absolutely void, and therefore to pass no title. The contention by the plaintiff was, that the lands though subject to homestead and pre-emption entry, were not of the character subject to selection by the State under the grant. Of this the court said:

All the facts upon which his contention rests are matters of statute and record, and any defense to the apparent legal title created by them was available in the action to recover possession. For if it be true as contended that this land thus certified to the State was not, under the acts of Congress, land open to selection, the validity of such certification, as of a patent, can be challenged in an action at law.

In Northern Pacific Railroad Co. *v.* Colburn (164 U. S., 383) the record did not show that patent had issued, but the court in speaking on this subject, and citing Burfenning *v.* Chicago, St. Paul, Minneapolis etc. Ry. Co., *supra*, said:

Though a patent had been issued it would not follow that that is conclusive in even an action at law, and that in all cases some direct proceedings to set aside the patent is necessary.

In the case of St. Louis Smelting etc. Co. *v.* Kemp (104 U. S., 636) the court in speaking of some of the exceptions to the general doctrine of the conclusiveness of a patent for land, after citing and commenting upon the cases of Polk's Lessee *v.* Wendal and Patterson *v.* Winn, *supra*, said:

The doctrine declared in these cases as to the presumptions attending a patent has been uniformly followed by this court. The exceptions mentioned have also been regarded as sound, although from the general language used some of them may require explanation to understand fully their import. If the patent, according to the doctrine, be absolutely void on its face, it may be collaterally impeached in a court of law. It is seldom, however, that the recitals of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. Of course, should such inconsistency appear, the grant would fail. Something more, however, than an apparent contradiction in its terms is

meant when we speak of a patent being void on its face. It is meant that the patent is seen to be invalid, either when read in the light of existing law, or by reason of what the court must take judicial note of; as, for instance, that the land is reserved by statute from sale, or otherwise appropriated, or that the patent is for an unauthorized amount, or is executed by officers who are not intrusted by law with the power to issue grants of portions of the public domain.

From these authorities and many others that might be cited, it must be considered as the settled law, that a patent is void on its face not only when fatally defective by its own terms, but also, whenever its invalidity appears by reference to any matter of which judicial notice may be taken, such as public statutes or treaties; and that such a patent is entirely null, conveys no title, and has no operative effect requiring resort to a court of equity for its avoidance. Nothing can be founded upon an act or transaction that is absolutely void, but from such as are merely voidable, good titles may ultimately spring. The patents here in question come clearly within the rule as to patents void upon their face.

The case of Stone *v.* United States (2 Wall., 69 U. S., 525), cited by your office is not in conflict with these views. That was a suit in equity to set aside and annul a patent for certain lands alleged to have been, at the date of the patent, within the limits of a military reservation which had been established by executive order. One of the questions presented and decided was as to the true location of the south line of the reservation. The determination of that question determined also, whether the lands were within or without the limits of the reservation. The patents were issued upon the supposition that the lands were not within the reservation. This was afterwards found to have been a mistake, but the mistake did not appear upon the face of the patent.

It had to be shown, and was shown, by extrinsic evidence. The patent was not void on its face, but was *prima facie* valid, and the case was therefore a proper one for equitable interference.

It is an equally well settled principle that until the legal title to lands which are a part of the public domain and as such subject to disposition under the laws relating to the public lands, has passed from the government by some instrument of conveyance, the Land Department retains jurisdiction over the same. A patent which does not pass the legal title because void on its face can not operate to defeat such jurisdiction. The vital question is: Has the legal title passed? If it has, the jurisdiction passed with it; if not, the jurisdiction remains in the Department. As said in Moore *v.* Robbins (96 U. S., 530–533):

> With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. . . . .
>
> The functions of that Department necessarily cease when the title has passed from the government.

In the recent case of Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589–592–3) the supreme court said upon this subject:

> Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the government. . . . . In other words, the power of the Department to inquire into the extent and validity of the rights claimed against the government, does not cease until the legal title has passed.

It is true the court in that case had under consideration the question of departmental jurisdiction in the administration of the swamp land grant of 1850, but the principle is the same as that here involved.

In the United States *v.* Schurz, (102 U. S., 378–402) the court, speaking of the authority of the officers of the Land Department, and especially with reference to the final act of those officers in the series essential to the transfer of title, said:

> Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away.

See also Parcher *v.* Gillen (26 L. D., 34).

It clearly appears from these authorities that the Land Department retains its jurisdiction over the public lands as long as the legal title remains in the government.

In view of what has been said it must be held that the patents issued in this case were void and of no effect; that they were inoperative to pass title from the government; that the legal title to the lands involved is still in the United States; and that the jurisdiction of the Land Department over them still exists.

To the extent that the case of Charles H. Moore *et al.* (16 L. D., 204) is in conflict with the views here expressed it is overruled.

The next question to be considered is whether the act of June 8, 1872, affords relief to the parties holding under the patents. That act provided for two classes of cases:

First: It permitted the purchase, upon certain stated terms, "of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty;"

Second: It permitted all "owners and holders of such claims in good faith . . . . to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned:"

And it was further provided:

> That it shall be shown . . . . that said claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same.

It is not believed that this case comes within either of the classes named. The scrip here involved was not issued until February 23, 1873, and the locations were not made until February 9, 1874. Neither the scrip nor the locations were in existence at the date of the act, which was entitled, "An Act to perfect certain land titles therein

described." It is apparent that the titles sought to be perfected were existing titles, based upon illegal locations or claims, and that the act was intended to operate retrospectively by giving protection only to past transactions. By the language of the act the Secretary of the Interior was authorized to permit the purchase "of such lands as may *have been* located" with claims arising under the treaty, evidently referring only to locations theretofore made, and the "owners and holders of such claims in good faith" were "permitted to *complete* their entries and *perfect* their titles under such claims" upon compliance with the provisions of the act, thus clearly contemplating holders and owners of claims and locations which were in existence but were incomplete and imperfect.

It is manifest that Congress was legislating with reference to existing conditions and not providing in advance a remedy for cases which might arise in the future. Had it been intended to change the existing treaties and statute and to authorize the future issuance and location of this character of scrip in a manner theretofore unauthorized, it is but reasonable to believe that resort would have been had to language better calculated to express that purpose. It seems to be clear, therefore, that neither the letter nor the spirit of the act embraces the claims or locations in question.

It does not necessarily follow, however, that the homestead application of Moore must be allowed. From the showing made when the case was formerly before the Department (16 L. D., 204) it appeared that portions of the lands had been subdivided into lots and that there were then a large number of holders of such lots. It is not improbable that equities have been acquired by such holders, or other claimants of the lands, which, while not enforceable against the government, ought to be recognized and protected. With a view to determining the status of all parties concerned and the best disposition to be made of the land, your office will order a hearing to ascertain the condition of the lands at the present time, who are existing claimants thereto and the character of their claims, together with such other information as may be obtainable relative to any existing equities in the premises. The local officers will give due notice of said hearing to Moore, and all other parties in interest, and will make due report. Upon receiving their report you will report to the Department, with your recommendation in the premises.

For the purpose of holding the land in its present status and avoiding any possible attempt by others to initiate claims thereto by settlement, entry or otherwise, the land included in the patents herein held to be void, is hereby reserved and withheld from settlement, entry or other disposition until further ordered.

In the event that it be shown that the present holders of this land under the void patents are innocent purchasers thereof in good faith, the Department will make a recommendation to Congress urging that appropriate relief be granted to them.

SWAMP LANDS—SELECTION—APPROVAL—REVOCATION.

INSTRUCTIONS.

An order revoking the approval of a swamp land list embracing the lands in a specified county is ineffective as to a tract which for the major part lies outside of said county, and was regularly selected.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 3, 1898.* (J. I. P.)

I am in receipt of your office letter "K" of the 21st instant recommending for reasons stated therein, that the revocation of so much of approved Missouri swamp land list No. 1, Milan series, as relates to the NE ¼ of the NE ¼, section 33, township 66 N., range 16 W., be canceled in order that patent may issue to the state for said tract.

It appears that said list was approved by the Department November 25, 1853, and that it was composed of lands in Adair, Schuyler, Putnam, Dodge, Chariton, Grundy and Mercer counties, in said state.

Because of certain irregularities in the matter of the selections in Schuyler county the approval of so much of said list as related to lands in that county was, on June 8, 1854, revoked as to 149 descriptions. That revocation is in the following language:

DEPARTMENT OF THE INTERIOR,
June 8, 1854.

The above approval of the 25th of November, 1853, is hereby revoked so far as it relates to the tracts situated in Schuyler county, Missouri, which tracts are designated in the within list by numbers in red ink from 1 to 149.

The tract here involved is designated No. 138 in red ink in said list.

In the case of William H. Frietly decided by the Department June 3, 1897 (unreported), involving the NW ¼ SW ¼ of section 4, township 65 N., range 16 W., Booneville land district, Missouri, designated as No. 87 in red ink in this same list, it was held that as the major part of the tract there involved was in Putnam county and not in Schuyler county, the revocation of the approval of the state's selection did not affect that tract, and that hence it stood appropriated to the state under the swamp land grant of September 28, 1850. The situation of this tract, as shown by the plats of the General Land Office, is identical with that one. The Chariton river forms the boundary between the two counties and flows through the tract here involved as it does through the tract involved in the Frietly case. But the major part of this tract, as of that, is in Putnam and not in Schuyler county.

There is a further reason, however, why the revocation of June 8, 1854, of the approval of said list to the State of Missouri does not affect this tract, and that is that it was not included in the lists of lands submitted to the surveyor-general by John W. Minor, agent for Schuyler county, concerning which the irregularities were complained of and

which resulted in the revocation mentioned. In other words it was never selected by nor claimed as being in Schuyler county. The list submitted by the counties other than Schuyler includes this tract.

Therefore, as there were no irregularities in the selection of this tract, and as the principle enunciated in the Frietly case fits precisely, I am of the opinion that the revocation of June 8, 1854 does not affect this tract, that there is no action required by this Department in the premises, and that there is no obstacle in the way of the patenting of said lands to the state under the approval of list No. 1, made November 25, 1854.

REGULATIONS CONCERNING PERMISSION TO USE RIGHT OF WAY OVER THE PUBLIC LANDS FOR TRAMROADS, CANALS, RESERVOIRS, ETC. ACTS OF JANUARY 21, 1895 (28 STAT., 635), MAY 14, 1896 (29 STAT., 120), AND MAY 11, 1898 (30 STAT., 404). APPROVED SEPTEMBER 17, 1898.

The following regulations are promulgated under the act of Congress of January 21, 1895 (28 Stat., 635), entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in business of mining or quarrying or of cutting timber and manufacturing lumber.

And the act of May 14, 1896 (29 Stat., 120), entitled "An act to amend the act approved March third, eighteen hundred and ninety-one, granting the right of way upon the public lands for reservoir and canal purposes," which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"SEC. 2. That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power."

1. It is to be specially noted that these acts differ from the other right of way acts of March 3, 1875, and March 3, 1891, in that they authorize merely a permission instead of making a grant, and that they

give no right whatever to take from the public lands adjacent to the right of way any material, earth, or stone for construction or for any other purpose.

2. The application for permission to use the right of way through the public lands must be filed, and permission granted, as herein provided, before any rights can be claimed under the acts, and should be made in the form of a map and field notes in duplicate of the center line of the right of way or of the tramroad, canal, or reservoir, and filed in the local land office for the district in which the right of way is located; if situated in more than one district, duplicate maps and field notes need be filed in but one district and single sets in the others.

3. The maps, field notes, evidence of water rights, etc., and, when the applicant is a corporation, the articles of incorporation and proofs of organization must be prepared and filed in accordance with the regulations for railroad, and for irrigation canals and reservoirs under the general right of way acts, as in the respective circulars relating to those subjects; forms 4 and 6 being modified in the last sentences to relate to the act under which the application is made.

4. An affidavit that the applicant is a citizen must accompany the application; if the applicant is an association of citizens, each must make affidavit of citizenship, and a complete list of the members thereof must be given in an affidavit by one of them; a corporation organized under the laws of the United States, or of any State or Territory, will be presumed to be an association of citizens within the meaning of the act. If not a natural-born citizen, the applicant will be required to file proofs of naturalization. The applicant must also state in the affidavit the purposes for which the right of way is to be used.

5. When application is made for "the use of necessary ground, not exceeding forty acres," the tract should be clearly designated on the map by colored shading or otherwise, its location and extent accurately described by field notes, if necessary, and it should be described in forms 3 and 4 by legal subdivision or by course and distance from a corner of the public surveys. The applicant must also make a statement in duplicate of the purpose for which the tract is to be used, which must also contain a showing that the tract is actually and to its entire extent necessary for the purposes indicated. In such cases, forms 7 and 8, should be written on the map and duplicate.

6. If the application is satisfactory to the Department, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case. And it is to be expressly understood in every case under the act of 1895 that the permission extends only to the public lands of the United States not within the limits of any park, forest, military, or Indian reservation; that it is at any time subject to modification or revocation; that the disposal by the United States of any tract crossed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract; and

that the permission is subject to any future regulations of the Department. Applications under the act of 1896 may be for rights of way upon forest reservations.

7. The applicant should mark each of the subdivisions affected by the proposed right of way "V" or vacant, if it belongs to the public domain at the time of filing the map in the local land office, and the same must be verified by the certificate of the register, which should be written on the map and duplicate. If it does not affirmatively appear that some portion of the public land is affected the local officers will refuse to receive the application.

8. When the maps are filed, the local officers will note in pencil on the tract books opposite each tract traversed that *permission* to use the right of way for a tramroad, canal, reservoir, or for electric purposes is pending, giving date of filing and name of applicant, noting on each map the date of filing.

9. When the permission is given by the Secretary of the Interior, a copy of the original map will be sent to the local officers, who will mark upon the township plats the line of the right of way, and will note in pencil opposite each tract of public land affected that *permission* has been given, noting the date of permission and the act.

10. Permission may be given under the acts for rights of way on unsurveyed land, maps to be prepared as in the circulars noted.

11. The act approved May 11, 1898 (30 Stat., 404), entitled "An act to amend an act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled 'An act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

By section 1 of said act an important extension of the scope of the act of 1895 is made. Applicants should state the purposes for which the right of way is to be used as required by paragraph 4.

12. Whenever a right of way is located upon a reservation, the applicant must file a certificate to the effect that the right of way is not so located as to interfere with the proper occupation of the reservation by the Government. When the right of way is located on a forest or timber reserve, the applicant must file a stipulation under seal to take no timber from the reservation outside the right of way. In accordance with the provisions of the circular of March 21, 1898, the applicant will also be required, if deemed advisable by the Commissioner of the General Land Office, to give bond in a satisfactory surety company to the Government of the United States, to be approved by him, such bond stipulating that the makers thereof will pay to the United States "for any and all damage to the public lands, timber, natural curiosities, or other public property on such reservation, or upon the lands of the United States, by reason of such use and occupation of the reserve, regardless of the cause or circumstances under which such damage may occur." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office.

F. W. MONDELL,
Acting Commissioner of the General Land Office.

Approved September 17, 1898.
WEBSTER DAVIS,
Acting Secretary of the Interior.

—

Forms 7 and 8 for use under act of May 14, 1896, as required by paragraph 5.

FORM 7.

STATE OF ——,
County of ——, *ss:*

——— ———, being duly sworn, says he is the chief engineer (or the person employed by) the ——— company under whose supervision the survey was made of the grounds selected by the company for electrical purposes under the act of Congress approved May 14, 1896; said grounds being situated in the ——— quarter of section —— of township ——, of range ——, in the State (or Territory) of ———; that the accompanying plat accurately represents the surveyed limits and area of the grounds so selected, and that the area of the ground so selected and surveyed is —— acres and no more; that the company has occupied no other grounds for similar purposes upon public lands for the system represented hereon; and that, in his belief, the grounds so selected, surveyed, and represented, are actually and to their entire extent required by the company for the necessary uses contemplated by said act of Congress approved May 14, 1896 (29 Stat., 120).

———— ————,
———— ————.

Subscribed and sworn to before me this —— day of ———, 18—.
[SEAL.]
———— ————,
Notary Public.

FORM 8.

I, ——— ———, do hereby certify that I am the president of the ——— company; that the survey of the tract represented on the accompanying plat was made under authority and by direction of the company, and under the supervision of ———, its chief engineer (or the person employed in the premises), whose affidavit precedes this certificate; that the survey as represented on the accompanying plat actually represents the grounds required in the —— quarter section —— of township —— of range ——, for electrical purposes and to their entire extent, under the act of Congress approved May 14, 1896; that the company has selected no other grounds upon public lands for similar purposes, for the system represented hereon; and that the company by resolution of its board of directors, passed on the ——— day of ———, 18—, directed the proper officers to present the said plat for the approval of the Secretary of the Interior, in order that the company may obtain the use of the grounds described under said act approved May 14, 1896 (29 Stat., 120).

——— ———,
President of the ——— Company.

Attest:

——— ———,
Secretary.

[Seal of Company.]

ISOLATED TRACT—SURVEY OF ISLAND.

JOHN C. SHAFER.

Where the survey of an island is ordered prior to the amendment of section 2455 R. S., and it is directed in such decision that after survey the island shall be sold as an isolated tract, but no action is taken on such direction until after such amendment, the land so surveyed can not be thus disposed of until the lapse of three years after survey, it being in the meantime subject to homestead entry.

Secretary Bliss to the Commissioner of the General Land Office, October 1, 1898.

(W. V. D.) (H. G.)

John C. Shafer appeals from the decision of your office of April 14, 1897, holding for cancellation his homestead entry made November 13, 1896, for an "Island in Cory lake," in section 19, T. 6 S., R. 12 W., in the Grayling, Michigan, land district.

It appears that the entryman made application for the survey of such island, and that by departmental decision of December 6, 1894 (unreported), it was held that such island "is public lands of the United States and subject to survey, disposal and sale under existing laws and regulations," and the application was accordingly approved and a survey thereof was authorized. Said decision also contains the following language:

> Thereafter (the survey) the lands should be sold for cash to the highest bidder after public notice of sale, under the provisions of section 2455 Revised Statutes. This method of disposal will give all interested parties an opportunity to bid for the possession of the island.

The area of this island is fixed in the application of Shafer for a survey thereof as two and a fourth acres, but his entry discloses that

the area, probably ascertained by survey, is 1.43 acres. Accompanying the said application for survey were affidavits of two parties who testify of their own knowledge to the existence of the island prior to the original survey in 1828, and also a petition of the owner of lands on the west side of the lake and forty-eight others protesting against the allowance of the application. These petitioners did not submit additional evidence called for. Such owner of the adjacent lands claims ownership by prescription of the island but did not aver any rights of riparian ownership. He did not object to the proper use of the island by the public, but he and the other petitioners did object to granting absolute control thereof to any one.

This Department held in such decision that the island existed in a navigable lake when the original survey was made and was not included in that survey and is not shown on the township plat, that the lake is still navigable, and neither rights by accretion nor riparian rights were involved in the consideration of Shafer's application, for a survey, and no right or title by prescription can run against the government.

It seems that no action was taken upon the departmental direction that the lands should be sold at public sale, up to the time that Shafer made his entry, over two years after the date of such departmental decision.

Section 2455 of the Revised Statutes was in force at the time of such decision ordering a survey, and then read as follows:

> It may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands, which, in his judgment, it would be proper to expose to sale in like manner. But public notice of at least thirty days shall be given by the land officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner.

This section was amended after such decision by the act of February 26, 1895 (28 Stat., 687) and was in force, as so amended, at the time of Shafer's entry on November 13, 1896. Such section now provides:

> Sec. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one-quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same shall have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon or sold by the government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

The departmental decision ordering a survey and public sale of the lands found that "the lands on the shores of the lake (containing the island) have been disposed of by the United States" so that the tract may be considered as an "isolated or disconnected tract or parcel of the public domain."

It appears that after making his entry Shafer was notified that an application to have the island offered at public sale under section 2455 of the Revised Statutes, if in accordance with the Circular of April 11, 1895 (20 L. D., 305, General Circular of October 30, 1895, p. 5), would be granted, but he declined to make such application, insisting on his entry of the tract.

In his appeal, he states under oath that he made the entry in good faith, and relying thereon, made improvements upon the tract in clearing the same, in erecting a building thereon for a residence and in putting out fruit and ornamental trees, before the adverse decision of your office was rendered; that the land is only valuable as a small homestead and because of its limited area; that he is a locomotive engineer by profession, but has been afflicted by muscular rheumatism for the seven years preceding his appeal: and that there are no claimants as against his homestead rights.

The section referred to has been construed by the Department since the same has been amended. It has been held that the policy of the law evidently was to offer at public sale only such isolated and disconnected tracts of land as were not wanted by homeseekers, and it was directed that they should not be disposed of at public sale until they had been subject to entry under the homestead laws for a period of three years after the surrounding lands had been entered, filed upon or sold by the government. (G. W. Allen, 26 L. D., 607, 608.) But if the lands have been appropriated by means of a homestead entry, the tract can not be regarded as "isolated," that is, undesirable as a homestead. (Hand *v.* De Remer, 26 L. D., 676, 679.)

From the departmental decision of December 6, 1894, ordering the survey of the island, it appears that the surrounding lands—those touching the lake—must have been entered more than three years prior to Shafer's entry, but the island itself was not subject to entry until it was surveyed and the statutory term of three years had not elapsed after such survey until Shafer made homestead entry for the tract.

As no action was taken under the recommendation of the Department regarding a public sale of the island, and as no application was ever made therefor before the change in the statute authorizing such public sale, the land was subject to entry after its survey and within three years thereafter. Within this period, Shafer made entry, and therefore, his entry must stand.

However, the description of the entry is vague and uncertain. It is of "an island in Cory Lake," in a certain designated section, township and range. This description is indefinite and uncertain and must be corrected in order to conform to the survey and to identify the tract. The applicant will be permitted to amend his entry by having inserted therein the description given in the field notes of survey in order that the tract entered may be described with such certainty as will clearly identify it.

The decision of your office holding the entry for cancellation is reversed, and you will order an amendment of the entry in conformity with this opinion.

DICKIE *v.* KENNEDY.

Motion for review of departmental decision of August 5, 1898, 27 L. D., 305, denied by Secretary Bliss, October 4, 1898.

CONTEST—INDIAN HOMESTEAD—NOTICE—SOLDIERS' FILING.

FEELEY *v.* HENSLEY.

In the case of a contest against an entry made under the general homestead law by a native born Indian, who has abandoned the tribal relation and adopted the customs of civilized life, it is not necessary to serve notice of such proceeding upon the Indian agent or Commissioner of Indian Affairs.

A contest will lie against a soldier's homestead entry on a charge of failure to settle upon the land and improve the same within six months from the date of his filing.

Secretary Bliss to the Commissioner of the General Land Office, October 4, 1898.

(W. V. D.) (H. G.)

William Hensley appeals from the decision of your office of March 8, 1897, revoking the decision of your office of October 15, 1895, and directing the cancellation of his homestead entry made April 1, 1892, for the SE. ¼ of Sec. 24, T. 15 N., R. 1 E., in the Guthrie, Oklahoma, land district, on his soldier's declaratory statement for said tract, filed October 6, 1891.

The following facts are gleaned from the record, including the decision of your office:

Hensley is a Winnebago Indian of full blood, and does not live upon any reservation. May 31, 1892, Lagrange Feeley filed an affidavit of contest against Hensley's entry, alleging abandonment and failure to establish residence upon the tract filed upon and entered by him. After a hearing, the local office recommended the dismissal of the contest. Thereafter, on the motion of the contestant for a new trial on the ground of newly discovered evidence, the said decision was set aside by the local office and a new hearing was appointed. This hearing resulted in the recommendation of the cancellation of Hensley's entry, and upon his appeal your office, on October 15, 1895, held that:

It is clear that your (the local) office failed to acquire jurisdiction, for the only attempt made to serve notice of contest was by making personal service on the defendant alone, while it is necessary, in cases where an Indian's homestead is contested, to notify the Indian agent, if there be one, and if not, then the Commissioner of Indian Affairs.

Your office thereupon set aside the decision of the local office, and the case was remanded for a hearing after service of notice, under the directions contained in the circular of January 22, 1877, a copy of which was set out in your said office decision; and the local office was further instructed that if Hensley were a non-reservation Indian, the Commissioner of Indian Affairs must be notified of the hearing.

October 22, 1895, the contestant filed a motion for a review of the said decision of your office. This motion and the record of the testimony were lost, and at the suggestion of your office the attorneys for the respective parties filed before the local office, on November 12, 1895, an agreed statement of facts, "for the purpose of saving expense and for supplying the lost papers." In this statement it was admitted that "the said Hensley has wholly abandoned said claim and never lived thereon," and further

that after filing his soldier's declaratory statement he took a stove and some other articles of furniture and provisions and put them in a log hut on the claim, since which time he has not pretended to live thereon, and that at the time of the trial of said contest the claim was abandoned, as shewn by the decision of the register and receiver, etc.

It was further agreed that the lost motion for review was based on the following assignments of error, viz:

1st. The Hon. Commissioner erred in not sustaining the decision of the local office wherein they recommended the cancellation of defendant's homestead entry;

2d. In holding that the local office failed to acquire jurisdiction of the defendant;

3d. In holding that the defendant's homestead entry was an Indian homestead entry, he having first filed a soldier's declaratory statement and afterwards filed a regular citizen's homestead entry, and paid the regular fee therefor, $14.00.

The parties also stipulated that Hensley is a full blood Winnebago Indian, not living on any reservation, and that in a statement attached to the motion for review, which was verified, the attorney for the contestant Feeley called the attention of your office to the fact that the homestead entry of Hensley was not made as an Indian homestead, but was made upon "regular citizen homestead blanks, and the customary fee of $14.00 paid therefor," and contended that Hensley "by virtue of being a soldier was amenable to the same laws as though he were a white man or a black man."

Your office held upon this agreed statement of facts, made as a substitute for the lost record, that conceding that the contest against Hensley proceeded irregularly, it appears that he had full notice of the action taken, with full opportunity to defend against the contest, and upon a re-examination of the case, it being admitted in the agreed statement of facts that he has never lived on the land, there existed no reason for remanding his case for a further hearing. Your office accordingly revoked its former decision remanding the case for proper service upon the Commissioner of Indian Affairs, and affirmed the action of the local office holding the entry for cancellation.

The applicant, William Hensley, although a Winnebago Indian of

full blood, filed his declaratory statement, and thereafter, when he made homestead entry for the tract in controversy, declared in his homestead affidavit that he was a native born citizen of the United States, over the age of twenty-one years. It must be presumed that he was and is an Indian born within the territorial limits of the United States and one who had at the time of filing his declaratory statement and of making his entry, taken up his residence separate and apart from any tribe of Indians therein, and had adopted the habits of civilized life, as his citizenship could apparently be derived from no other source. These conditions brought him within the pale of citizenship, where he has voluntarily placed himself. (24 Stat., 388, 390, Sec. 6, act of February 8, 1887.) It was unnecessary, therefore, to notify the Commissioner of Indian Affairs, as your office decision of October 15, 1895, held. The homestead privilege was conferred upon native born Indians who have severed tribal relations and abandoned savage for civilized life. (Turner *v.* Holliday, 22 L. D., 215.) The Indian entryman did not attempt to secure an allotment to him of non-reservation lands, whereby he would become a citizen, but relied upon his citizenship as one who had separated from his tribe and had adopted the habits of civilized life. By his voluntary act, his declaration of citizenship under oath, and his accepting the conditions imposed by law upon other citizens, in filing his declaratory statement and making homestead entry for the tract in question, he acknowledged that he laid no further claim to the guardianship of his person by the United States. That relationship ceasing, all obligations on the part of the government toward him, as an Indian, except such as are enjoyed by citizens in common, are canceled. The protection afforded by Congress and by this Department to the Indians while in a state of dependency ceases when the state of pupilage or wardship of the latter no longer exists. (See the case of Miami Indians, 25 L. D., 426, 430.)

Personal service seems to have been had upon Hensley, the entryman, and he appeared by counsel at the hearing.

The local office had jurisdiction of the contest proceeding and of the parties thereto. The evidence, which has been lost, but which appears in the agreed statement of facts, appears to establish the charge of abandonment alleged against the entryman, excluding the admissions of abandonment. The contest was not brought prematurely. The soldier's declaratory statement was filed October 6, 1891, entry was made April 1, 1892, and the contest affidavit was filed May 31, 1892.

A contest will lie against a soldier's homestead entry on a charge of failure to settle upon the land and improve the same within six months from the date of his filing. (George *v.* Stroud, 22 L. D., 245.)

It appears that Hensley did not reside upon the tract and never established a residence there, and did not pretend to live thereon.

For the foregoing reasons the decision of your office is affirmed.

RAILROAD GRANT—MILITARY RESERVATION WITHDRAWAL ON GENERAL ROUTE.

NORTHERN PACIFIC R. R. CO.

The provision in section 13, act of March 3, 1863, creating the Territory of Idaho, that "all laws of the United States which are not locally inapplicable shall have the same force and effect within said Territory of Idaho as elsewhere in the United States" was intended to give effect in said Territory only to such *general* laws as were not locally inapplicable, and did not operate to carry into effect as to said territory the *special* limitation contained in the act of February 14, 1853, by which the authority of the executive to establish reservations was restricted to not exceeding six hundred and forty acres at any one place.

The case of Fort Boise Hay Reservation, 6 L. D., 16, overruled.

The withdrawal following the designation of the general route of the Northern Pacific is no bar to the exercise of the executive authority in the establishment of reservations for any needful purpose; and a reservation so made, prior to the definite location of the line of said road, and existing at such time, excepts the land covered thereby from the operation of the grant.

Secretary Bliss to the Commissioner of the General Land Office, October 8, 1898.

(W. V. D.) (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of September 14, 1893, holding that the portions of Sec. 1, T. 50 N., R. 5 W., and Sec. 35, T. 51 N., R. 5 W., Coeur d'Alene land district, Idaho, embraced in the reservations made by executive order dated April 22, 1880, are excepted from its grant made by the act of July 2, 1864 (13 Stat., 365).

The grant made by the third section of said act is of—

every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office.

The history of these reservations, taken from your office decision, is as follows:

By executive order of August 25, 1879, a reservation was created for military purposes on the north side of the Spokane river and Lake Pend d'Oreille, of an irregular shaped tract, with an area of 15.72 square miles. By executive order dated April 22, 1880, the former order was canceled, as the reservation therein created was in excess of that authorized by law, and in lieu of said reservation, two tracts of six hundred and forty acres each were set apart, one for a post reserve and the other for winter pasturage reserve. There was some question as to the exact location of said winter pasturage reservation, and in office letter of May 18, 1886, to your office, it was stated that from the diagram accompanying said executive order of April 22, 1880, it appeared probable that it falls within four different sections and you were directed to reserve, until further orders, the following tracts on account of said pasturage reserve, viz:

W. ½ section 31, T. 51 N., R. 4 W.

All section 36, T. 51 N., R. 5 W.

N. ½ section 1, T. 50 N., R. 5 W.

NW. ¼ section 6, T. 50 N., R. 4 W.

April 27, 1886, said pasturage reserve was transferred to the Interior Department for disposal under the act of July 5, 1884. Said pasturage reserve has since been surveyed and its location definitely determined, and according to the plats of survey approved by U. S. surveyor-general, March 20, 1893, nearly all of the N. ½ of section 1, T. 50 N., R. 5 W., and 10.17 acres of the E. ½ SE. ¼ and 1.65 acres of the SE. ¼ NE. ¼, said section 35, T. 51 N., R. 5 W., are included in such reservation.

The portions of the odd numbered sections described are within the primary limits of the grant for said company as adjusted to the line shown upon the map of definite location filed August 30, 1881. They had been previously included within the limits of the withdrawal made under the provisions of section six of the granting act, upon the map of general route filed February 21, 1872.

Your office decision appealed from holds that said withdrawal was no bar to the reservation of the lands by the United States, and, as said reservation existed at the date of the filing of the map showing the line of definite location of the road opposite this land, it served to except from the operation of the grant the portions of the odd numbered sections included within the limits of said reservation.

In its appeal the company urges, among others, the following grounds of error:

1. Error to rule that the reservation of one mile square or six hundred and forty acres directed by President's order of April 22, 1880, for a "winter pasturage" reserve for Fort Coeur d'Alene operated to except the land embraced therein from the grant to the company.

2. Error not to have ruled that as six hundred and forty acres had been reserved for the fort or post, any further or additional reservation was prohibited by statute and the winter pasturage reserve was without authority of law.

3. Error not to have ruled that, if there was authority for such a reservation, yet, as the land embraced in this reserve became on 21st February, 1872, reserved by statutory enactment for the Northern Pacific R. R. Company, it was not in the power of the executive to set aside said statutory reservation to the extent of taking the land from the grant.

It is first necessary to inquire into the authority to make the reservation, for if, as contended by the company, the same was prohibited by law, it would not defeat the operation of the grant.

This land was originally within the boundaries of the Territory of Oregon as defined by the act of August 14, 1848 (9 Stat., 323).

By the fourteenth section of the act of September 27, 1850 (9 Stat., 500), being "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands, the authority of the President to make reservations for the purposes of "forts, magazines, arsenals, dock-yards, and other needful public uses" was without any restriction whatever.

In this particular, however, the act was amended by section 9 of the act of February 14, 1853 (10 Stat., 159, 160), which is entitled "An act to amend an act entitled 'An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and to

make donations to the settlers of the said public lands,' approved September twenty-seventh, eighteen hundred and fifty." This act provides that all reservations heretofore as well as hereafter made under the act of September 27, 1850, shall as to *forts* be limited to an amount not exceeding six hundred and forty acres "at any one point or place."

The tracts here in question fell within the limits of the Territory of Washington as fixed by the act of March 2, 1853 (10 Stat., 172), entitled "An act to establish the Territorial government of Washington," and by the sixth section of the act of July 17, 1854 (10 Stat., 305), entitled "An act to amend the act approved September twenty-seventh, eighteen hundred and fifty, to create the office of surveyor-general of the public lands in Oregon, etc., and also the act amendatory thereof, approved February nineteen (fourteen), eighteen hundred and fifty-three," it is declared "that all the provisions of this act, and the acts of which it is amendatory, shall be extended to all the lands in Oregon and Washington Territories."

It will thus be seen that the restrictions upon the power of the Executive to make reservations for the purposes named, contained in the act of February 14, 1853 (*supra*), were expressly extended to the Territory of Washington. The lands in question afterwards fell within the boundaries described in the act of March 3, 1863 (12 Stat., 808), establishing the Territory of Idaho, the thirteenth section of which act provided:

> That the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory of Idaho as elsewhere in the United States.

It is claimed on behalf of the company that the effect of the language last quoted was to extend the restrictions upon the power of the Executive to reserve lands for forts, contained in the act of February 14, 1853 (*supra*), to the Territory of Idaho.

A similar question was, by the Secretary of War, submitted to the Attorney General for opinion, which opinion will be found in Volume 19 of the Opinions of the Attorney General, page 371.

The particular question submitted related to the validity of the Executive order of August 5, 1878, by which fifty acres of land were added to the Fort Missoula military reservation in Montana, which as originally established by executive order dated February 19, 1877, contained six hundred and forty acres.

The portion of Montana included in the enlarged reservation at Missoula was originally within the Territory of Oregon, afterwards within the Territory of Washington, and later included within the Territory of Montana.

The Territory of Montana was created by the act of May 26, 1864 (13 Stat., 85), which contained a similar provision to that quoted from the act establishing the Territory of Idaho, viz:

> That the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory of Montana as elsewhere within the United States.

In considering the effect of said provision the Attorney General used the following language:

It is said that the limitation of six hundred and forty acres for forts, at first especially applied to Oregon Territory, and, afterwards, *especially applied* to Washington Territory, is in force in Montana under the provision just quoted from the act of May 26, 1864, because that limitation is not locally inapplicable to Montana.

But was it the purpose of Congress to make operative in Montana all the special and local legislation in the statute books of the United States that might not be locally inapplicable to that particular region? It is manifest that the argument that would admit *any* particular special legislation would necessarily extend to *all;* the language being "*all laws . . . . . not locally inapplicable.*" The result of such an interpretation of the act of 1864 would be a medley of laws, no one of which might be locally inapplicable to Montana, while, taken together, they would make an incongruous mass of legislation.

In my view such was not the intention of Congress, but that intention was, I think, to give effect in Montana only to all *general* laws of the United States not locally inapplicable; such for instance, as laws relating to civil rights, marine ports of entry, etc. I do not think it would be reasonable or safe to give any larger sense to the act of 1864.

In addition to the considerations already stated, it may be remarked that the legislation specially applicable to Oregon was, as we have seen, made operative in Washington Territory by *express terms*, and it may be entitled to some weight in this discussion that during the period of eleven years which has elapsed since the alleged invalid executive order of August 5, 1878, was made, Congress has seemingly acquiesced in that order, which would probably not have been the case if Congress had thought that the executive department of the government had acted in open disregard of limitations of authority which were intended to apply to that department.

Unless, therefore, I should take the extraordinary position that the effect of section 9 of the act of 1853 (*supra*) was to impose a burden on all the land in the then Territory of Oregon, and that Congress intended that the burden so imposed should run with and follow that land, like a covenant, after the land had ceased to belong to that particular Territory, I must conclude that the executive order of August 5, 1887, was not in conflict with section 9 of the act of February 14, 1853 (*supra*), that statute having no application to the subject whatever.

If it is objected that, if we exclude, as inapplicable to these lands in Montana, the act of 1853 restricting the reservation to six hundred and forty acres, we for the same reason must exclude the original act of 1850, which, it is said, grants to the President the power to make any reservation. To this I answer that in my opinion the validity of the Executive order of August 5, 1878, and that of February 19, 1877, to which it was supplemental, rest not on that statute, but on a long-established and long-recognized power in the President to withhold from sale or settlement, at discretion, such parts of the national domain, open to entry and settlement, as he may deem proper. This power Congress recognizes in the legislation above discussed, which does not grant any such power, but only seeks to restrict one already existing. When Congress creates an exception from a power, it necessarily affirms the existence of such power, and hence the well-known axiom that the exception proves the rule.

It may indeed be stated that Congress has, in other legislation, repeatedly recognized the existence of this power of the President. For instance, the preemption act of 29th of May, 1830 (4 Stat., 421), contains the following clause: 'Nor shall the right of preemption contemplated by this act extend to any land which is reserved from sale by act of Congress *or by order of the President*, or which may have been appropriated for any purpose whatever.' So by the preemption act of September 4, 1841 (5 Stat., 456), 'land included in any reservation by any treaty, law,

or proclamation of the President of the United States, or reserved for salines or for other purposes, are exempted from entry under the act.'

In addition to this congressional recognition, the supreme court of the United States has repeatedly adjudged the existence of this power in the President. (Wolcott *v.* Des Moines Company, 5 Wall., 681; Grisar *v.* McDowell, 8 ib., 363; Wolsey *v.* Chapman, 101 U. S. R., 755; Williams *v.* Baker, 17 Wall., 144; Wilcox *v.* Jackson, 13 Pet., 498.)

It follows, therefore, that the President was fully empowered to make the executive order of August 5, 1878, and that while that order remains unrevoked the land covered by it is not open to entry or settlement. In reaching this conclusion I have not overlooked the distinction, claimed on behalf of the War Department to obtain, between "posts" and "forts," and which some of the statutes seem to recognize, but have preferred to rest my conclusions on the broader grounds that the restrictive act of 1853 is wholly inapplicable to these lands in Montana.

After a careful review of the matter, this Department accepts the construction placed upon said provision by the Attorney General, and so much of the decision of July 7, 1887 (6 L. D., 16), as denied the right in the executive to make a reservation in Idaho, in excess of six hundred and forty acres, for the Fort Boise hay reserve, is overruled and will not longer be followed.

It follows, therefore, that the power existed in the executive to make the reservation under consideration for a winter pasturage reserve on April 22, 1880, if the lands were a part of the public domain subject to such reservation.

It is urged by the company in its third ground of error that if there was authority for such a reservation, yet, as the land embraced in this reserve became on 21st February, 1872, reserved by statutory enactment for the Northern Pacific R. R. Company, it was not in the power of the executive to set aside said statutory reservation to the extent of taking the land from the grant.

In the case of Northern Pacific Railroad Company *v.* Sanders (166 U. S., 620–636), in considering the effect of the withdrawal made under the sixth section of the granting act, upon the filing of the map of general route, the court says:

The only ground upon which a contrary view can be rested is the provision in the sixth section of the act of 1864, that "the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act." But this section is not to be construed without reference to other sections of the act. It must be taken in connection with section three, which manifestly contemplated that rights of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established. Literally interpreted, the words above quoted from section six would tie the hands of the government so that even it could not sell any of the odd-numbered sections of the lands after the general route was fixed—an interpretation wholly inadmissible in view of the provisions in the third section. The third and sixth sections must be taken together, and so taken it must be adjudged that nothing in the sixth section prevented the government from disposing of any of the lands prior to the fixing of the line of definite location, or, for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands.

To the same effect is the decision in the case of Menotti *v.* Dillon (167 U. S., 703). See also Northern Pacific R. R. Co. *v.* Martin, 6 L. D., 657, in which it was held (syllabus):

The legislative withdrawal following the designation of the general route of the Northern Pacific was only from sale, entry and pre-emption, and did not debar, within its limits, the executive from the exercise of its ordinary authority in the matter of establishing military reservations.

By these cases it is clearly established that under the grant made by the act of July 2, 1864, *supra*, and like grants, the filing of the map of general route does not prevent the reservation, for any needful purpose, of the lands falling within the limits of the withdrawal provided for upon the filing of said map of general route and that such right remains in the United States until, by definite location, the grant acquires precision.

The land embraced in the order of April 22, 1880, was therefore properly subject to reservation, and as the order was still in force at the date of the filing of the map of definite location, to wit, August 30, 1881, such lands were, by reason of their reserved character, excepted from the operation of the grant under which appellant lays claim.

It is learned, however, by inquiry at your office, that the portions of the odd-numbered sections within said reserve have, since the forwarding of the record upon the company's appeal, been patented to the company, to wit, on December 22, 1894.

The issue of a patent for these lands was a clear inadvertence, and it is therefore directed that demand be at once made upon the company for the reconveyance of the lands, as contemplated by the provisions of the act of March 3, 1887 (24 Stat., 556).

TIMBER CULTURE CONTEST—PROCEEDING AGAINST HEIRS.

FRANK *v.* CORLISS HEIRS.

In a contest against the heirs of a timber culture entryman it is necessary to allege and prove the death of the entryman.

Secretary Bliss to the Commissioner of the General Land Office, October 8, 1898.

(W. V. D.) (L. L. B.)

By your office decision of March 19, 1897, the timber culture entry of Timothy E. Corliss, made August 23, 1887, for the NW. ¼ of Sec. 28, T. 135 N., R. 46 W., St. Cloud, Minnesota, was held for cancellation on the contest of James H. Frank, charging failure to comply with the requirements of the law in planting and cultivating trees. The contest was against parties designated as the heirs of the entryman.

E. E. Collins, on behalf of himself and the other alleged heirs, has appealed, and assigns as error—

That it was error to hold that the heirs were estopped from denying

their heirship by appealing from the decision of the register and receiver; that it was error to hold that the complaint stated sufficient facts to constitute grounds for a contest, and that the evidence was insufficient to warrant the cancellation of the entry.

None of the defendants appeared at the hearing, and the evidence showed that nothing had been done in the way of tree culture or other improvements or cultivation since the date of the entry nearly nine years prior to the hearing.

The objection that the affidavit did not state facts sufficient to constitute a cause of action, appears to be based upon the failure to allege the death of the entryman. This objection must be sustained. In a contest against the heirs of an entryman it is necessary to allege and prove the death of the entryman. (Jenks *v.* Hartwell's Heirs, 13 L. D., 337.)

There is no allegation either in the affidavit or notice of contest that the entryman is dead. It is true that the defendants are described as the heirs of Timothy E. Corliss, "deceased," but this mere description is not sufficient to dispense with the required allegation of the death of the entryman.

The affidavit being defective, it is not necessary to discuss the sufficiency of the proof thereunder. The case is remanded with leave to the contestant to amend his affidavit, if he so desires, and proceed with his contest under the ruling in the case above cited.

The decision appealed from is vacated.

RIGHT OF WAY—ACT OF MARCH 3, 1891.

W. H. NELSON.

A natural ravine or creek bed that does not carry water sufficient to be appropriated under the laws of the State may be used for a reservoir and ditch, and an application for a right of way therefor approved under the act of March 3, 1891.

Secretary Bliss to the Commissioner of the General Land Office, October 8, 1898.

(W. V. D.) (F. W. C.)

With your office letter "F" of December 23, 1897, were transmitted maps and field notes in the matter of the application filed by W. H. Nelson for right of way under the provisions of the act of March 3, 1891 (26 Stat., 1095), for a reservoir and ditch, the same being located in townships 38 and 39 N., ranges 12 and 13 E., Susanville land district, California, upon which you recommend that the map of location be approved only so far as it represents the reservoir site and the portion of the ditch outside of the natural water course.

The reservoir is a little more than nine miles from the land claimed by Nelson which is intended to be irrigated by the water collected in said reservoir. The ditch on account of which the application for right of way is based, is stated to be nine miles and 1,650 feet in length, and

with the exception of 198 feet on Nelson's land, is a natural depression or ravine sometimes carrying water. The reservoir is formed by a dam across the upper portion of this ravine or creek.

The surveyor states that—

This reservoir is not located upon any running stream, or any stream of water, or any stream of flowing water, such as is subject to location and appropriation under the civil code of the State of California, the water supply being temporary and derived solely from the melting of the snow upon the adjacent hills and mountains. For this reason no location of a water right has ever been made. The water shed or source of water supply comprises about thirty-six square miles in Tps. 38 N., ranges 11 and 12 E.

To my knowledge there has never been any measurement of the maximum or minimum flow, nor any estimate of the average monthly or average annual flow of said water at the point of diversion from which data can be obtained as to the amount of water that runs in this ravine.

Relative to the ditch he states that—

This ditch, to the extent that it is constructed, is of a uniform width of four and one-half feet at high-water line. The natural water course adopted as a ditch is from ten to twenty feet wide and from four to six feet deep, and the deviations in the width thereof are so numerous and occur at such frequent intervals that it is impracticable to note them on the maps and in the field notes.

In your letter submitting the application under consideration it is stated that—

The application shows that the water supply is to be derived from the melting snow over a water shed covering an area of about thirty-six square miles. The surveyor alleges that the water course is not such a stream as is subject to location and appropriation under the civil code of the State of California, for which reason "no location of a water right has ever been made."

It appears from the report of the chief of the weather bureau for 1895–6, that during the year 1895, the amount of rainfall in the locality in question was twenty-four inches. Such an amount of rainfall would approximate fifty thousand acre feet for the water shed, with a probable run-off more than sufficient for the capacity of the reservoir, stated to be 420.84 acre feet.

There can hardly be any question but what the run-off from such a volume of water and the regular channel with well defined sides and banks, evidently formed by the flow of the water for a series of years, and extending for a greater distance than nine miles, are the conditions which constitute a natural stream within the definition laid down by the courts (Kinney on Irrigation, p. 62), and which would seem to be the proper point at which to limit the approval of maps granting right of way for canals or ditches under the act of 1891.

* * * * * * *

It would appear that the applicant's right to the use of the stream for the conveyance of water is amply protected by the federal law (sections 2339 and 2340 U. S. R. S.) and the State law without the necessity for recourse to the act of 1891. The State law (Code of Cal., Sec. 1413) provides that "The water appropriated may be turned into the channel of another stream and mingled with its waters and then reclaimed." Kinney in commenting on this section (p. 536) states "The using of a natural stream for a ditch is very common practice in California; and it is sanctioned by the above statute and the decisions of the courts." (See also par. 246, p. 396.)

The main difference, in fact, between the use of a stream under the State law and the acquirement of a right of way under the act of 1891 (*supra*) is that by the latter act the grant to the applicant not only covers the ground occupied by the water of

the canal or ditch but in addition fifty feet on each side of the marginal limits thereof so far as may be necessary for the construction, maintenance and care of the same. The grant of such a strip on either side of a natural stream may result in serious complications in the adjustment of the rights of the grantee and subsequent settlers and appropriators who may desire access to the stream under the State law and lead to unnecessary litigation.

In the case under consideration it would appear that, aside from the water collected in the reservoir and turned into the ravine, the water therein would consist merely of surface drainage.

There being no general flow of water within the ravine, questions relating to the right of access by adjoining proprietors would not seem to arise. It is not seen, therefore, how a conflict could arise between applicant and subsequent "settlers and appropriators who may desire access to the stream."

If Nelson has the right to collect the water in his reservoir, which is admitted, he would have the right to convey the same to the point where its use was desired by means of a ditch which he might construct. This being so, there would seem to be no sufficient reason upon which to deny his application for right of way upon the ground that he seeks to adopt a natural ravine or creek bed, which does not carry water sufficient to be appropriated under the laws of the State.

As before stated, you recommend the approval of the ditch only so far as it is outside of the natural depression, or ravine. The map and field notes show but 198 feet of the ditch outside of this depression, and this is upon claimant's land, over which he does not need to secure the right of way.

For the reasons herein given, your recommendation is not approved.

The map has been approved as to the reservoir site, but is returned for your further examination of the ditch in view of the directions herein given and to ascertain whether upon the showing made, the same sufficiently conforms to paragraph 20 of the circular of July 8, 1898 (27 L. D., 200).

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

NORTHERN PACIFIC R. R. CO. *v.* CORYELL.

A specification of losses by sections instead of parts of sections may be accepted as sufficient where the losses are within a reservation and the status of the entire section is the same.

The case of Dunnigan *v.* Northern Pacific R. R. Co. 27 L. D., cited and followed.

Secretary Bliss to the Commissioner of the General Land Office, October 8, 1898.

(W. V. D.) (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of July 8, 1895, holding for cancellation its indemnity selection covering the NW. ¼ of Sec. 7, T. 16 N., R. 45 E., Walla Walla land district, Washington.

This tract was included in the company's list of selections filed in the local office March 20, 1884, said list being without a designation of losses as bases for the selections, as permitted by the circular of May 28, 1883 (12 L. D., 196).

On September 2, 1892, the company filed a list in which losses were designated for the selections covered by the list of March 20, 1884, the basis being unsurveyed lands within the Yakima Indian Reservation.

Prior to the presentation of the company's list of March 20, 1884, one William Bridgefarmer had tendered an application to make homestead entry of this land, which was rejected for conflict with the indemnity withdrawal made on account of this grant; from which action he appealed. Said appeal was pending in your office, unacted upon, at the time of the presentation of the company's list of March 20, 1884, but upon the prosecution of the case arising upon Bridgefarmer's application to this Department, it was held, by departmental decision of August 6, 1894 (unreported), that the withdrawal was no bar to the acceptance of Bridgefarmer's application, and that upon completion of entry by Bridgefarmer the company's selection would be canceled. Bridgefarmer was duly advised of his right to complete entry of this tract, and on February 14, 1895, the local officers reported that he had waived his right of entry and that Charles H. Coryell had been permitted to make homestead entry of the land on January 10, 1895.

Your office decision of March 20, 1895, held that the action of the local officers in allowing Coryell to make entry of the land while the company's selection was intact, was erroneous, and they were directed to advise Coryell that he would be allowed sixty days within which to appeal or show cause why his entry should not be canceled. In response to this notice he filed a showing before your office, and upon a further examination of the case your office decision of July 8, 1895, now under consideration, held that the company's list of losses filed September 2, 1892, was a substitution for the selection of March 20, 1884, and an abandonment thereof, and that the same was invalid because the losses were not arranged tract for tract with the selected land, and therefore held the company's selection for cancellation; from which action the company has appealed to this Department.

It appears that the only objection to the losses specified in the company's list of September 2, 1892, is that the losses are specified by sections instead of parts of sections. As the losses are within an Indian reservation, the status of the entire section being the same, the objection to the sufficiency of the designation is not a good one, and the designation is accepted as a sufficient compliance with the requirements in the matter of the designation of losses.

All other questions raised are substantially similar to those considered in the recent case of Patrick J. Dunnigan *v.* Northern Pacific R. R. Co. (27 L. D., 467), and for the reasons therein given your office decision is reversed, and you will notify Charles Coryell, claimant

against said railroad company, of his right to transfer his claim to other lands in lieu thereof, in accordance with the provisions of the act of July 1, 1898 (30 Stat., 621); and in the event he declines this option the railroad company will, under the provisions of said act, be duly invited to relinquish the land herein claimed and to select other lands in lieu thereof.

SALINE LANDS IN OKLAHOMA-ACT OF JANUARY 12, 1877.

A. H. GEISSLER.

There is no law authorizing the disposal of saline lands except the act of January 12, 1877, and said act is not applicable to the Territory of Oklahoma.

Secretary Bliss to Mr. A. H. Geissler, Wichita, Kansas, October 8, 1898.
(W. V. D.) (E. F. B.)

The Department is in receipt of your letter, without date, submitting in behalf of yourself and others who propose to organize a company to be known as "The Oklahoma Salt Company," an application to lease the "eastern saline reserve," in the Territory of Oklahoma, and, if the Department has no authority to grant or lease such lands, you ask that they be reserved from disposal under the general land laws until you can have an opportunity to apply to Congress at its next session to secure for the Department the necessary power and authority.

There is no law authorizing the disposal of saline lands, except the act of January 12, 1877 (19 Stat., 221), which is not applicable to the Territory of Oklahoma.

The settled policy of the government is to reserve the saline lands from disposal under the general land laws, and in the absence of some statutory provision, the executive Department has no authority to dispose of the same, either by lease or sale. Morton *v.* Nebraska, 21 Wal., 660; South Western Mining Company, 14 L. D., 597, and authorities cited.

The lands embraced in the eastern, middle, and western reserves, formerly covered by leases made by the Cherokee Nation, prior to March 3, 1893, were, by proclamation of the President of July 7, 1898, restored to the public domain to be disposed of under the laws of the United States relating to public lands in the Cherokee Outlet, subject to the policy of the government in disposing of saline lands.

If the lands within said reservation are actually saline in character, they would not be subject to entry under the general land laws, and hence no action is necessary on the part of the executive Department to reserve them from disposal.

The abrogation of the reservation only restored to settlement and entry under the public land laws such lands formerly embraced in such reservation as may not be saline in character.

For the reasons above set forth, your application is denied.

DESERT LAND ENTRY—IRRIGATION—APPROPRIATION OF WATER.

UNITED STATES *v.* MCKINNEY.

The present power to supply, by means of a pump and fixtures, water in a sufficient quantity to render the land productive, with due provision made for the distribution of the water, may be properly accepted as a proper showing in the matter of irrigation, though at such time no crop is planted on the land.

Where the laws of a State permit the appropriation of water from navigable streams for purposes of irrigation, no ownership of the water taken from such a stream need be shown, only the appropriation thereof, and the ownership of the proper means for its distribution over the land.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 12, 1898.* (C. J. W.)

George M. McKinney, it appears, made final desert land entry, at North Yakima, Washington, September 1, 1893, for the SE. ¼ of the NE. ¼, the NW. ¼ of the SE. ¼, the SE. ¼ of the SW. ¼, and lots 1, 3, 4, 5, 6, and 7, Sec. 32, T. 14 N., R. 26 E., and his entry was held for cancellation on the report of Special Agent Marsh Atkisson, on November 30, 1894, charging that the land had not been reclaimed or irrigated.

The defendant paid the purchase price and received final certificate at date of entry. On his application, a hearing was ordered and held to determine the truth of the charge as to want of reclamation, and evidence was offered by the United States and by defendant.

The local officers, before whom the hearing was had, recommended that the entry be allowed to stand, and transmitted the record to your office.

On June 19, 1896, your office considered the case and held said entry for cancellation. The defendant appealed, and, on June 23, 1898, the Department affirmed your office. (Decision not reported.) The defendant has moved for review of said decision, upon apparently proper grounds.

The case presents questions the solution of which is not without its difficulties. There is no adverse claimant in the case. The final proof, *prima facie*, shows compliance with the law, and the charge is made long after its submission. There is no doubt of the desert character of the land, and that it will not produce crops without irrigation. It is situate on the east side of Columbia river, which is a navigable stream, at an elevation above the river of about sixty feet. It is shown to be out of the reach of other sources of water supply by gravitation in ditches, except at a cost rendering the plan impracticable. The plan adopted by the entryman for the reclamation was to pump the water from the Columbia river into a main ditch at a sufficient elevation on the land to admit of its distribution over it. The main ditch extended laterally through the claim. The power for elevating the

water was a "Nye vacuum pump," with suction pipe extending to the water in the stream and delivery pipe extending to the head of the ditch on the land. The preponderance of the evidence shows that the pump was of such power as to deliver in the ditch, when in operation, sufficient water to irrigate the tract. It appears to have been operated one day and to have delivered water in the ditch at the expected rate. There was no crop upon the land at the time, but it is stated by the entryman and his witnesses that the ditch is so constructed as to touch all the subdivisions of the tract, and Mills, who was an expert witness for the government, says it was so constructed as to carry sufficient water to irrigate the tract. There is some controversy as to what quantity of the land had water conducted upon it the day the pump was operated. The local officers express the opinion that the evidence failed to show the incapacity of the pump to supply sufficient water to irrigate the land and to show that it did not do so on the day it was operated.

It appears that the plant was located above the ordinary high water mark, but that soon after its erection there was an extraordinary flood in the Columbia river, which overturned the boiler and swept away part of the fixtures, and that the entryman has been unable to meet the expenses of necessary repairs, and at the time of the hearing the land appeared to be desert and unreclaimed. The overthrow and damage of the pump and fixtures were from providential cause, and can not be charged to the negligence of the entryman. *Prima facie*, it is shown that the pump on the day that it was operated carried water on the land in sufficient quantity to irrigate it, if continued, and the fact is not disproved. There was at that time potential irrigation of the tract—that is to say, the present power to apply water in sufficient quantity to cause the land to produce a crop—and the question arises, whether this demonstration of the then existing power to reclaim the land, which ceased before any crop was planted, can be accepted in lieu of actual reclamation.

In the case of Dickinson *v.* Auerbach (18 L. D., 16), it was held:

> With respect to the distribution of the water over the smallest legal subdivision, as the law contemplates shall be done, I find greater difficulty in reaching a conclusion. The correct and equitable view of this question requires, not so much the actual presence of water on each forty, as the power to conduct it there when required. Supply *in posse*, rather than *in esse*, meets the requirements of the law, and satisfies the demands of equity. The main ditch having been shown, in this case to afford an ample flow of water for the irrigation of the claim in its entirety, and its actual flooding having been proved, the obliteration of the small ditches, and water furrows months after the test, was a thing to have been expected. These are merely temporary, and are changed annually, or oftener, according to the exigencies of farming operations. Potential irrigation is accomplished when the water in sufficient volume, has been brought on the land, and so disposed as to render it available for distribution when needed.

The application of the principle here announced, it is insisted, forbids the cancellation of defendant's entry. In the case quoted *supra*, the water was conducted upon the land from a canal, which diverted a part of the water from a flowing river, which canal was tapped by Auerbach's ditch. Through these channels the water came from its source upon the land by gravitation. In the case at bar, "a pump and fixtures" serve the purpose of the canal and ditch in the other case, and are, in the nature of things, less reliable and permanent as a means of conducting water from its source to the land than a canal or ditch. Their purchase and use in this case seem to have been in good faith.

Under the laws of the State of Washington the entryman had a right to appropriate a sufficient quantity of water from this navigable stream to irrigate his land, provided he did not thereby impede navigation. This method of irrigation was lawful. No ownership of the water itself need be shown in such case, but only its appropriation, and the ownership of the machinery for its elevation and conveyance to and upon the land.

The proof shows ownership of the pump and fixtures, and there is no evidence that its continued use for the purpose of annual irrigation was not contemplated in its purchase and erection. The purchase and erection of the pump and its use for pumping water on the land were a legal appropriation of sufficient water to reclaim it.

The correctness of the final proof is disputed, and the evidence at the hearing puts it in doubt, but is in the nature of negative testimony. This negative testimony is based mainly upon hasty examinations of the land after the time the entryman claims to have operated his pump, and, so far as it disputes the sufficiency of the system of ditches constructed on the land for the conveyance of water through it, is without force to overcome the positive evidence of the entryman and his witnesses.

The testimony of G. S. Mills, an engineer, who made a partial survey of the tract and prepared a map based thereon which was introduced in evidence, demands some special notice, since your office seems to have regarded it as the most important evidence against the entry. This witness examined the land nearly two years after final proof was made, but his testimony is a virtual contradiction of the other witnesses who testified for the government, as to the presence and capacity of the ditches. He says from what he saw of the ditch it had been properly constructed, and was of ample capacity to irrigate the lands, but by reason of the sandy soil, which drifts readily, it had become partially obliterated; that he traced it over a thousand feet, and it may have extended further. He found evidence that about two-thirds of the enclosed land had been overflowed.

It is evident that the existence of the ditches testified to by claimant and his witnesses is not disproved by the testimony offered for

that purpose. If the testimony of Mills is to become authority for discrediting the final proof, it must be because of the opinion expressed by him, based on his partial survey, that a large part of the claim was above the level of the main ditch and could not be irrigated from it.

The testimony for defendant is to the effect that seventy to seventy-five acres of the land were fenced with substantial posts and barbed wire, and upwards of thirty acres cleared and plowed preparatory for fruit culture; that ditches were constructed to touch each subdivision of the claim, and a large quantity of wood cut and hauled for operating the pump; that the pump was operated for the best part of two days, and the water flowed through the ditches and watered the plowed land; that the further improvement was suspended only because of the flood disaster and the want of means; that the map filed with the final proof is based upon a carefully made survey, in which the elevations were taken with approved instruments and were correct.

The uncertainty of obtaining accurate results from the use of a hand level in taking elevations is clearly shown. This testimony deprives the map prepared by Mr. Mills of its force as testimony, and detracts greatly from the weight of his opinion as an expert.

The conclusion reached is, that the impeaching testimony is not sufficient to justify the rejection of the final proof and the cancellation of the entry.

Departmental decision of June 28, 1898, is accordingly revoked, your office decision reversed, and the desert land entry of defendant held intact for patent in its order.

OKLAHOMA LANDS—SETTLEMENT—EVIDENCE.

SHAFER *v.* GRISS.

Slight acts of settlement performed on the day of opening may be accepted as sufficient, if followed within a reasonable time by residence and such improvements as clearly show good faith.

The fact that the witnesses are not sworn before examination does not vitiate the trial, where after examination they subscribe to their depositions and are sworn thereto.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 10, 1898.* (C. W. P.)

The record shows that, on September 27, 1893, Nels Griss made homestead entry, No. 936, of the SW. ¼ of Sec. 2, T. 27, R. 1 W., Perry land district, Oklahoma Territory. On October 14, 1893, Charles Shafer filed his affidavit of contest, alleging priority of settlement.

A hearing was held. The local officers, having considered the case upon the testimony submitted, found for the contestant and recommended that Griss's entry be canceled and the contestant be allowed to make entry of the land. On appeal your office remanded the case to allow the introduction of further testimony. The local officers again

recommended the cancellation of Griss's entry and that the contestant be allowed to make entry of the land. Griss appealed. Your office held that the preponderance of the evidence "leads to the conclusion that the plaintiff staked the tract in dispute before defendant," and affirmed the decision of the local officers. Griss appeals to the Department.

It is well settled that, when the evidence is conflicting, the decisions of the local and general land offices as to questions of fact will not be disturbed by the Department, unless clearly wrong. Hargrove *v.* Robertson, 15 L. D., 499, and cases cited. An examination of the testimony, which is conflicting and irreconcilable, does not show that the concurring decisions of your office and the local office are "clearly erroneous," but appears to justify the conclusion reached, that a preponderance of the testimony is in favor of the contestant.

The contestant swore that he entered the Cherokee Outlet, which was opened to settlement on September 16, 1893, at a point on the south line of Kansas, about half a mile west of the Indian meridian, and that he rode a dun colored horse; that he rode over the prairie for about a mile and a half, and then upon an old trail which he followed until it crossed Scatter creek, north of the tract in controversy, when, leaving the trail, he rode south about half a mile and planted his stake on the southwest quarter of said tract. In the statement that he reached the place where he made his settlement and planted his stake, from the north, he is supported by seven witnesses. If they are to be believed, and Shafer arrived upon the land in controversy after Griss had made his settlement, Shafer must have passed Griss, who settled on the NE. ¼ of the tract, and from the lay of the land Griss must have seen him. But Griss swears that he did not see him; that the first time he saw him, he was coming from the *south* or *southwest*, and in this he is supported by several of his witnesses. The weight of the testimony shows that Shafer came from the north, and must have passed very near the spot where Griss made his settlement. It would appear from this that Shafer must have passed that spot before Griss reached it, and for that reason Griss did not see him until he saw him after he had made his settlement, about a hundred rods south of Griss, and Griss and his witnesses must be mistaken when they swear that Shafer was coming from the south. Then, Brooks (a witness for Shafer), who testified that, before Shafer reached the land, he settled on the tract adjoining the land in dispute on the north and at a point near the timber on Bitter Creek and in a northwesterly direction from the place where Shafer stopped, swore that he saw Shafer stop and stake the land, and that there were no other persons than Shafer located on the tract; that "he could have seen them if they had been there;" and Griss's witness, France, who swore that he did not see Griss on the tract, when he crossed it, testified that he saw Brooks located at the time he crossed Bitter Creek. He also testified that

Osborn, another witness for the contestant, was ahead of him in the race and was located before he crossed Bitter Creek, and Osborn swore that there was no other person but Shafer located on the claim in controversy east of Bitter Creek at the time he saw Shafer stake the land. The evidence of this witness for Griss tends to strengthen the testimony of these two witnesses for the contestant. They were ahead of Shafer and saw him arrive upon the land, and they swore that Griss was not on the land at that time. The witnesses for the contestant, with the exception of one witness, Ellis, appear to have been strangers to him before the opening of Cherokee Outlet, and their evidence is consistent and credible. It does not appear, therefore, that the decisions rendered by the local officers and your office are "clearly erroneous."

It is contended that the settlement of Shafer was insufficient to hold the tract against the settlement and entry of Griss. But the evidence shows that the slight acts of settlement performed by Shafer on the day of the opening of the Outlet were followed by residence within a reasonable time and such improvements and cultivation as clearly shows his good faith, which is all that the law requires. Penwell *v.* Christian, 23 L. D., 10.

Then, it is urged that it was such an error as vitiated the trial before the local officers, that they did not swear the witnesses for the contestant, before they testified in the case. It appears from the record that these witnesses, after their examination, subscribed their depositions and swore to them before the receiver. This would appear to be sufficient. The rules of practice do not require that, on a trial before the local officers, the witnesses shall be sworn before their examination, and when the evidence is taken by deposition on interrogatories, rule 29 simply directs that the depositions so taken "must be by him subscribed and sworn to in the usual manner before the witness is discharged." It is held in some cases in the State courts that where the statute prescribes the form of the oath to be administered to a witness whose deposition is taken out of the State, that form must be observed or the deposition will be suppressed. But in Tooker *v.* Thompson, 3 McLean (U. S.), 92; Wight *v.* Stiles, 29 Maine, 164; Barson *v.* Pettes, 18 Vermont, 385, it was held that in the absence of any statutory provision, the witness may be sworn either before or after his evidence is reduced to writing.

It is also urged that the deposition of Samuel Trimble, taken after the case was remanded by your office for additional testimony, should be suppressed, as not authorized by your letter of December 31, 1895, remanding the case. But there is no force in this contention. The case was remanded for additional testimony, and clearly it was not error in the local officers to allow the contestant to take Trimble's deposition.

The decision appealed from is accordingly affirmed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

INSTRUCTIONS.

The commencement of proceedings against an entry within two years from date of final receipt defeats the confirmatory operation of the proviso to section 7, act of March 3, 1891, whether notice of such action is given within said period or thereafter.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 10, 1898.* (E. F. B.)

I am in receipt of a communication from your office of September 10, 1898, expressing doubt as to the construction of the decision of the Department in the case of Paul *v.* Wiseman (21 L. D., 12), with reference to the question as to whether an entry is confirmed under the proviso to the seventh section of the act of March 3, 1891 (26 Stat., 1095), where proceedings were instituted against said entry within two years from the date of final receipt but service of notice of such proceedings was not made or given until after the expiration of such period.

In reply you are advised that the commencement of any proceedings against the entry would be sufficient to prevent the bar of the statute, whether notice is given within said time or not. (Instructions of July 1, 1891, 13 L. D., 1; John Malone *et al.*, 17 L. D., 362, and authorities therein cited.)

The facts in the case of Paul *v.* Wiseman warranted the conclusion therein reached, but it announced a rule contrary to the instructions of July 1, 1891, and it has not been followed in any subsequent decision of the Department.

Your office will therefore be controlled by the instructions of July 1, 1891.

AMENDMENT OF ENTRY—SECTION 2372 R. S.—ADVERSE CLAIM.

NAEGELIN *v.* KEMP.

The right under section 2372 R. S., to amend an entry "where the certificate of the original purchaser has not been assigned, or his right in any way transferred," is not defeated by the entryman's sale of the land where he subsequently acquires title thereto.

A patent may be surrendered and the entry amended to correspond with the applicant's settlement and occupancy; and such right of amendment will not be defeated by an adverse intervening entry made with knowledge of the applicant's occupancy.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 12, 1898.* (G. R. O.)

The plat of township 35 N., R. 9 W., New Mexico Mer., was filed in the local land office at Del Norte, Colorado, on April 27, 1877. This township soon after became a part of the Lake City, Colorado, land district,

and on October 2, 1882, it became part of the Durango, Colorado, district.

On September 21, 1880, William Naegelin filed preemption declaratory statement No. 373 (Lake City series), for the W. ½ of the NE. ¼, SE. ¼ of NE. ¼ and NE. ¼ of SE. ¼ of Sec. 7, T. 35 N., R. 9 W., New Mexico Mer., having purchased the possessory right to said land from one John W. Park, who had filed preemption declaratory statement No. 145 for the same on June 23, 1879. On October 18, 1881, Naegelin made cash entry No. 155 for said land, and on November 5, 1884, patent therefor issued to him.

The survey of said township being erroneous, a new survey was made, plat of which was approved December 22, 1891. This plat described the land entered by Naegelin as lots 7, 8, 10 and 11 of Sec. 7, said township and range. Your office, by letter of February 2, 1893, instructed the local officers to notify any known party in interest that if it was desired to have the patent corrected so as to conform to the new survey an application in the usual form should be made.

On September 7, 1893, Charles Quinn filed a corroborated affidavit, alleging that he had purchased the said land from Naegelin in 1886, supposing that he was purchasing lots 6, 7, 8 and 11 (described as W. ½ NE. ¼ and N. ½ SE. ¼, under the old survey), which land Naegelin had pointed out to him as the land included in his patent; that Naegelin had entered said lot 10, supposing that he was entering lot 6, and had settled upon lot 6 and improved it in the belief that it was included in his entry, but had made no improvements whatever upon lot 10 and had never settled thereon; that one John Kemp, learning of Naegelin's mistake, and with full knowledge of his occupation and improvements on lot 6, had made homestead entry of said lot, and had instituted suit against the affiant for possession of said tract. He asked that the entry of Naegelin be amended so as to include lots 6, 7, 8 and 11 of said Sec. 7. On November 23, 1894, your office denied this application, for the reason, among others, that change of entry could not be allowed upon application of a transferee. A motion for review of this decision was filed, and on April 29, 1895, your office considered same and again denied the application, stating, however, that if the land was still in Naegelin's possession, or if he had acquired title thereto by reconveyance, the question of ordering a hearing to determine the respective rights of Naegelin and Kemp to the lot might be considered. On April 5, 1895, William Naegelin filed an affidavit, setting forth substantially the same facts as were alleged in the application of Quinn and asking that his entry be amended as asked for in Quinn's application. On May 16, 1895, he surrendered his patent for the land embraced in his cash entry and filed a certified copy of a warranty deed dated May 7, 1895, in which Quinn reconveyed the said land to him. On this application your office ordered a hearing, which was had on March 23, 1896, before the receiver and a special agent of your office, who had been detailed to act in place of the register who was disqualified. On April

16, 1896, the said officers rendered a decision, recommending the cancellation of Kemp's entry and that Naegelin be allowed to amend his entry as requested. On appeal to your office this decision was affirmed. Kemp has now appealed to this Department.

The testimony shows clearly that Naegelin intended to enter lot 6 instead of lot 10, and that he used every reasonable precaution and exertion to avoid the error which he now seeks to correct. He had lot 6 partially under cultivation, and occupied and improved it from the time of his settlement until he sold the land to Quinn. Lot 10 was of no value except for the timber which was upon it, and which was cut off before the sale was made to Quinn. It is shown that he made no objection to the cutting of this timber, and received nothing for it. These facts indicate very strongly that he did not know that lot 10 was included in his entry. He employed a person to ascertain the description of the land for him who had been employed for the same purpose by his neighbours, and did all that could reasonably be required of him to have his entry made properly.

Section 2372 Revised Statutes permits the amendment of an entry under circumstances of this kind only in cases "where the certificate of the original purchaser has not been assigned, or his right in any way transferred." In this case the record shows that Naegelin conveyed his title to the land to Charles Quinn who, after the error had been discovered reconveyed it to him. The title is now, therefore, in the entryman, and there appears to be no good reason for not giving him the same status with reference to this land as he held before he sold it. The purpose of the above provision of the statute was to protect entrymen who might, through unavoidable mistake, make entry of land not covered by their improvements. The mere fact that he has parted with the title and acquired it again is no reason for denying him this protection.

In the case of Roberts *et al. v.* Gordon (14 L. D., 475), Roberts had made a mistake similar to that made by Naegelin in the case now under discussion, and had not discovered such error until after patent had issued including land not occupied by him and excluding a tract on which he had valuable improvements. He was allowed to relinquish that portion of the land which he had included in his entry by mistake and to take in place of it the tract which had been inadvertently omitted therefrom, although the adverse claimant had, as in the present case, made a homestead entry of said tract.

The testimony shows that Kemp was surveying a ditch in the vicinity of this land several months before he filed on it, and he learned then that the tract was enclosed and under cultivation. He discovered afterwards that no application to enter the tract had been filed in the local land office, and he at once applied to enter it himself. Knowing that the land was occupied by another person, it was plainly his duty to ascertain what adverse claim existed to it. He failed to do this,

evidently hoping to secure the benefit of the labor that Naegelin and Quinn had expended in clearing and draining the land.

In the case of Cawood *v.* Dumas (on review; 25 L. D., 526) it was held (syllabus):

The right of a settler to amend his entry so that it shall correspond with his settlement, where by mistake he has misdescribed the land, is not defeated by an intervening adverse claim, if the applicant for the right of amendment shows priority of settlement, due compliance with law, and does not appear by any act of his own to have misled the adverse claimant.

Following the cases above cited, Naegelin will be allowed to amend his entry so as to include lot 6 instead of lot 10. His patent has been surrendered, and in addition he will be required to furnish an abstract of title showing the title to the land described in his patent to be in himself, and a quit-claim deed, from himself and wife, properly executed, conveying said land to the United States. Patent will then issue to him for the land included in his amended entry. Kemp's entry will be canceled.

For the reasons stated your decision is affirmed.

RAILROAD GRANT—INDEMNITY SELECTIONS—SUSPENSION OF ACTION.

NORTHERN PACIFIC R. R. CO.

Action suspended on indemnity selections of the Northern Pacific where the losses assigned therefor are of lands between Thomson Junction and Duluth and within the limits of the grant to aid in the construction of the St. Paul and Duluth railroad.

Action will not be suspended on indemnitiy selections of said company, where the losses originally assigned were of lands east of the terminal limit established at Duluth and the company acting under departmental permission has substituted other bases, west of said terminal, that have proved to be invalid.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 12, 1898.* (F. W. C.)

In your office letter of September 28, 1898, are presented the facts bearing upon certain indemnity selections made by the Northern Pacific Railroad Company, and the attention of this Department is called to the request made by said company for a suspension of action upon said lists because of the pending suit involving the location of the eastern terminus of the grant made by the act July 2, 1864 (13 Stat., 365), to aid in the construction of said road.

As presented by your said letter two classes of selections are involved, viz:

First: Where the losses assigned as bases for the selections are of lands between Thomson Junction and Duluth, in the State of Minnesota, and within the limits of the grant made to aid in the construction of the St. Paul and Duluth railroad, with which company the Northern Pacific Railroad Company made certain agreements hereto-

fore held by the Department (23 L. D., 204), to be, in effect, a confederation and consolidation of the grants between said points within the meaning of the act making the grant to aid in the construction of the Northern Pacific railroad. Relative to this class of selections it is directed that action thereon be suspended for the reason that the sufficiency of the bases is necessarily involved in the pending suit, and they should be included in the suspension heretofore ordered relating to lands listed and selected to the east of the terminal limit established at Duluth, Minnesota.

Second: Where the losses originally assigned as bases were of lands to the east of the terminal limit established at Duluth, Minnesota, and the company, acting under the permission granted it to substitute other bases, specified lands within the limits of the grant to the west of said terminal line, but which, upon examination, proved to be invalid for other reasons. Relative to these selections the request for suspension is denied. This Department held the original bases to be insufficient because outside the limits of the grant, but on account of previous recognition given to the claim of a grant to the east of Duluth, permitted the company, within a stated time, "to specify a new basis for any of its indemnity selections avoided thereby" (21 L. D., 412, 423). Within the time named the company, while protesting against this decision, "filed a list of losses to be *substituted* for those . . . . originally filed." The new bases were thereby as effectively specified in place of the original ones as if they had been named in the beginning, and the old bases were as effectively withdrawn as if they had never been specified. The company did not elect to stand upon the bases first specified and, hence, they are no longer a matter for consideration in connection with these selections.

MILLE LAC INDIAN LANDS—JOINT RESOLUTION OF MAY 27, 1898.

DAVID H. ROBBINS.

By the joint resolution of May 27, 1898, all public lands formerly within the Mille Lac Indian reservation are declared open to entry under the settlement laws.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 12, 1898.* (J. L. McC.)

David H. Robbins has appealed from the decision of your office, dated April 14, 1897, sustaining the action of the local officers in rejecting his application, presented December 29, 1896, to file a soldiers' declaratory statement for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 2, T. 43 N., R. 27 W., St. Cloud land district, Minnesota.

The ground of such rejection was that the land applied for is situated within the Mille Lac Indian reservation, and is not subject to disposal under the general land laws, but only under the special provisions of the act of January 14, 1889 (25 Stat., 642).

Said action of the local officers was proper at the time when taken, and your office decision sustaining the same was correct when made. Since that date, however, Congress has passed a joint resolution, approved May 27, 1898 (30 Stat., 745), which reads as follows:

That all public lands formerly within the Mille Lac Indian reservation, in the State of Minnesota, be, and the same are hereby, declared to be subject to entry by any bona fide qualified settler under the public land laws of the United States; and all preemption filings heretofore made prior to the repeal of the preemption law by the act of March third, eighteen hundred and ninety-one, and all homestead entries or applications to make entry under the homestead laws, shall be received and treated in all respects as if made upon any of the public lands of the United States subject to preemption or homestead entry: *Provided*, That lot four in section twenty-eight, and lots one and two in section thirty-three, township forty-three north, of range twenty-seven west of the fourth principal meridian, be, and the same are hereby, perpetually reserved as a burial place for the Mille Lac Indians, with the right to remove and reinter thereon the bodies of those buried on other portions of said former reservation.

In view of the passage of the joint resolution above quoted, the papers in the case are herewith returned for action by your office in accordance therewith.

SOLDIERS ADDITIONAL HOMESTEAD—ACT OF AUGUST 1894—ASSIGNEE.

ROBORDS *v.* LAKEY ET AL.

Whether a deed conveying land entered on a certificate of a soldier's additional homestead right is in fact an absolute conveyance, or only intended as a mortgage, it will be treated by the Land Department as giving the grantee the status of an assignee entitled under the act of August 18, 1894, to receive patent in his own name, leaving to the courts the determination of any right that may be asserted on behalf of parties claiming an interest in the land on the ground that said conveyance was in fact intended as a mortage.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 15, 1898.*

In the above entitled case, being a contest for title to the N. ½ of the SE. ¼ of section 31, T. 21 N., R. 4 E., Helena, Montana, land district, the Department, March 25, 1897 (24 L. D., 391), held that the additional homestead entry of Lakey for the land above described, made May 4, 1889 (final certificate No. 1381), under a certificate of right issued by your office February 26, 1889, should stand and that patent should issue to Kendall, under the act of August 18, 1894 (28 Stat., 397), as assignee of Lakey. In furtherance of that decision, and especially in pursuance of the direction of June 29, 1887, from your office, the final certificate theretofore issued to Lakey was amended by the local officers by the substitution of Kendall's name, as assignee, in place of that of Lakey.

August 14, 1897, George W. Bird who, as shown by the decision of March 25, 1897, *supra*, was also claiming to be the assignee of Lakey,

filed a motion for a new trial on the ground of newly discovered evidence tending to show that the conveyance from Lakey to Kendall, under which Kendall claims title, was not an absolute conveyance but was made at the instance of one J. O. Gregg for the sole and only purpose of securing the payment of a loan of $3000, made by Kendall to Gregg. It is not claimed in this motion that the conveyance from Lakey to Kendall did not pass, or was not intended to pass, Lakey's full right and title to the land, or that thereafter Lakey retained or had any equity of redemption or other interest therein, nor is any attempt made to state what was to become of the title upon the payment or discharge of the loan, or who in the meantime was to hold the equity of redemption. Bird does not claim this equity of redemption nor does he claim to have acquired or to hold any interest under Lakey's conveyance to Kendall.

As shown by the decision of March 25, 1897, *supra*, Bird obtained no right whatever to the land under his conveyance from Lakey and since he does not claim under Lakey's conveyance to Kendall it is no concern of his whether the latter was an absolute conveyance or was intended only as a mortgage. Bird's motion for a new trial is, therefore, denied.

December 10, 1897, a petition for permission to intervene in this case was filed by J. O. Gregg, alleging that Gregg and not Kendall, is the real assignee of Lakey and as such is entitled to patent upon Lakey's entry. December 22, 1897, an affidavit by J. M. Burlingame, jr., making application to join Gregg in such intervention, was filed, and since then several affidavits and other papers have been filed in support of the intervention so petitioned for by Gregg and Burlingame. In brief, it is claimed by Gregg and Burlingame that Gregg purchased from Lakey the latter's certificate of his right to make an additional homestead entry; that the Lakey entry was made for the sole use and exclusive benefit of Gregg under the certificate so purchased; that Ashburn K. Barbour, who is described in the decision of March 25, 1897, *supra*, as having made the entry under this certificate as attorney-in-fact for Lakey, was, in truth, acting at the request and on behalf of the said Gregg, who was then the holder and owner of such certificate; that through the instrumentality of the powers of attorney which accompanied the said certificate at the time of its purchase by Gregg, the said Barbour, at the request and on behalf of Gregg, but in the name of Lakey, conveyed the land by warranty deed to Kendall, immediately following the entry; that the purpose in conveying to Kendall instead of to Gregg was to enable the former to hold the land as a security for the payment of a $3000 loan made by Kendall to Gregg; and that Kendall was to hold the title to the land in trust for Gregg subject only to the payment of said loan by the latter. Burlingame claims under a deed from Gregg to himself, dated April 1, 1896, which purports to convey an undivided portion in the land.

If the claim of Gregg and Burlingame thus presented were accepted as true in all respects, Kendall, by virtue of the arrangement between himself and Gregg made at the time of the entry, would still be entitled to hold the land until the loan is paid or otherwise discharged, and if in contemplation of law Kendall's interest in the land is that of a mortgagee and Gregg and Burlingame hold the equity of redemption, the issuance of a patent to Kendall will not disturb the existing relations of these parties nor will it enlarge the rights of Kendall or impair those of Gregg and Burlingame. But the issuance of a patent to Gregg might effectually deprive Kendall of his security for the payment of the loan made to Gregg and if that is the purpose of the proposed intervention of Gregg and Burlingame, the land department should not aid its accomplishment. If that is not the purpose of the intervention, then its real purpose can be accomplished after the issuance of patent without imperiling the rights of Kendall.

Whatever transactions may have taken place between Gregg and Kendall, the facts remain that the entry was made in the name of Lakey and, apparently, for his benefit; that thereupon the land was conveyed to Kendall who still retains the title; and that Gregg is not connected with the title obtained under the Lakey entry by any conveyance whatever. Whether other facts connected with the entry of the land and the conveyance thereof to Kendall are such that Kendall holds the land primarily as security for the payment of a loan, and, secondarily, in trust for Gregg, and whether any subsequent transactions have altered their relations with respect to the land, are matters which can be as effectively determined by the courts after the issuance of patent as by the Department before the issuance thereof. If, as between Gregg and Kendall, the latter by reason of the conveyance made to him occupies apparently a different position with relation to the land than that which the law would ascribe to him after a judicial ascertainment of the facts, it must be remembered that he occupies that position solely and only through the action of Gregg.

Burlingame, who is the son-in-law of Gregg, purchased with knowledge of Kendall's claim, so that he occupies no better position in the premises than that occupied by Gregg himself.

Upon the record in this case and the proofs submitted in support of the proposed intervention, it can not be successfully claimed, despite Gregg's present statement to the contrary, that either Gregg or Burlingame was without notice and knowledge of the proceedings heretofore had in the land department, whereby Kendall has been seeking to obtain a patent for the land in controversy as an assignee of Lakey. Rights arising out of this entry have been the subject of contest and litigation in the land department since a short time after the entry was made. Amy Gregg, the daughter of J. O. Gregg (and since the wife of Burlingame), instituted a contest against this entry and another

entry, made by one Cole, wherein she filed an amended complaint in the local office February 27, 1891, alleging:

Second. That on or about the 14th day of May, A. D. 1889, at the above named land office the claimant Ashburn K. Barbour under and by virtue of a power of attorney to locate and enter land, executed by Simon Lakey of Gainesville, Ozark county, Missouri, to said Barbour, made final soldier's additional homestead entry No. 4212, F. C. 1381, in the name of Simon Lakey, for the north half of the southeast quarter of section thirty-one (31) in township twenty-one (21) north of range four (4) east, in the county of Cascade, Montana.

That prior to the location and entry of said land, said Simon Lakey alienated, sold, assigned, and transferred all his right acquired by virtue of his original homestead entry, and delivered the script therefor, to said Ashburn K. Barbour, for a valuable consideration then and there to him in hand paid by said Ashburn K. Barbour; that it was the intention of said Lakey and said Barbour, at the time of making such sale and alienation of said right to enter lands, that said Ashburn K. Barbour should thereby become the sole owner of any and all lands to be entered by virtue of said script, said Lakey then executing and delivering to said Ashburn K. Barbour an irrevocable power of attorney to locate and make entry of government lands under said script, together with an irrevocable power of attorney to said Ashburn K. Barbour to alienate, sell and convey all such lands and entry thereof, and to receive [sic] to the individual use and benefit of said Ashburn K. Barbour all the proceeds thereof.

That after the alienation of said right to locate and enter lands, and payment of the purchase money for said right to said Simon Lakey by said Ashburn K. Barbour, said Ashburn K. Barbour did make entry of the lands aforesaid not for the use and benefit of said Simon Lakey, but in fact for the sole and individual use and benefit of said Ashburn K. Barbour, and his assigns, and for the interest of no other person.

and this statement was corroborated by an affidavit of J. O. Gregg, as follows:

Joseph O. Gregg, being first duly sworn, deposes, and says: That he has heard read the foregoing complaint, that he is acquainted with the land therein described, and that the allegations therein contained are true; that Ashburn K. Barbour admitted to affiant that he had purchased the above-mentioned scrips prior to their locations and the entry of said lands, and that he purchased the same for his own use and benefit, and not for the use and benefit of said Cole or said Lakey.

On the same day upon which this amended complaint was filed, the receiver of the local office wrote to your office with reference to this contest, saying:

We are not convinced of the good faith of the parties in this transaction. Contestant Gregg is related to her corroborating witness, J. O. Gregg; J. O. Gregg and Contestee Barbour are connected in land transactions in the vicinity of Great Falls, where this land lies, and since this case arose, Barbour has filed affidavits of good character of Gregg to assist Gregg in a land case before this office. It is perfectly clear it is a collusive contest to secure title to the land beyond dispute.

Thereafter, this letter of the receiver having been brought to the notice of J. O. Gregg, the latter filed in said contest an affidavit which, omitting the caption, reads as follows:

Joseph O. Gregg, being first duly sworn, deposes, and says: That he is one of the corroborating witnesses in the above-entitled case and a relative of Amy Gregg, the contestant therein; that he has read what purports to be a copy of letter of Hon.

Geo. M. Bourquin, receiver of the Helena, Montana, land office, dated February 27th, 1891, and June 8th, 1891, filed in this case.

That he is not acquainted with Simon Lakey, claimant, but is acquainted with claimant Ashburn K. Barbour. That he is not and never has been a partner in business with said Barbour, but that in connection with other parties he has money invested in townsite property the title of which is held by said Barbour as trustee. That he is not and never has been interested with said Barbour in any part of the lands above referred to, entered by said Simon Lakey. That there is not to his knowledge any collusive understanding or agreement between the parties hereto; that affiant in an interview with him was told by said Barbour that there had been served on him a copy of the complaint in this case; that said Barbour was indignant and said he would have the case dismissed, and that he would defend the same to his best ability; that said Barbour further said he had a perfect right to buy said scrip outright, and to locate it as he did, that the complaint did not make out a case because it was the general practice and had been for years, to locate lands in that way, and that no court would disturb the title to lands acquired in such way because in his judgment such scrip was a right in property which the soldier might sell or dispose of as he would any other property. That I have never been a party to any contest in said Helena land office.

In 1891 one Robords made application to contest said entry and January 5, 1893, Burlingame made application to the local office to be "made a party to any contest involving said lands."

Soon thereafter Kendall made application to intervene, asserting that he had purchased the land in good faith for the sum of $3,000, and was the owner of the Lakey title. The departmental decision of July 7, 1893 (17 L. D., 60), which terminated the contest of Amy Gregg adversely to her contention and ultimately dismissed Burlingame's application to intervene, is the same decision which ordered a hearing upon Robords' contest and upon Kendall's application to intervene; but while the application of Kendall was served upon counsel for Amy Gregg, and while the departmental decision of July 7, 1893, *supra*, gave full notice of Kendall's claim, no opposition whatever was made by J. O. Gregg, Amy Gregg or Burlingame until the filing of J. O. Gregg's petition to intervene December 10, 1897, a period of over four years. During this time there had been two hearings in the local office upon the matters in controversy between Robords, Kendall, and Bird, the last of whom had been also permitted to intervene as a claimant under the Lakey entry, and these proceedings were known to J. O. Gregg; in fact, it is shown by the papers and admitted by counsel for J. O. Gregg, that the contest of Amy Gregg against this entry was really begun and prosecuted under the direction and in the interest of J. O. Gregg. If, during the pendency of Kendall's application, a period of over four years as aforesaid, Gregg was content to have Kendall obtain the government patent because of his reliance upon Kendall's faithfully performing any trust devolving upon him, and if Gregg has since had occasion to withdraw his confidence in Kendall and to actively assert his own rights, there is nothing in the showing presented which supports this theory, excepting the fact that Kendall in 1897 conveyed the land in controversy to one Thomas Keely; but this he had a right to

do if the conveyance to Kendall was absolute and not intended as a mortgage.

While Kendall has not been heard in opposition to the recent showing to the effect that his interest is that of a mortgagee only, it is observed that notwithstanding Gregg's contradictory statements and unexplained conduct, the showing made is a very strong one, and this statement is made for the purpose of clearly showing that this question of fact between Kendall and J. O. Gregg has not been tried and is not now decided.

Kendall is equally an assignee under the Lakey entry, whether he holds the title under that entry absolutely and in his own right, or whether he holds it primarily as security for Gregg's indebtedness to him, and, secondarily, in trust for Gregg.

Considering the very conflicting statements made by J. O. Gregg respecting his interest in the Lakey entry, as hereinbefore shown, and considering his failure to make any timely objection to Kendall's application for a patent, and considering his attack upon the Lakey entry through the Amy Gregg contest, it is believed that no injustice will be done if patent is issued to Kendall as assignee under the Lakey entry, and J. O. Gregg and Burlingame are remitted to a court of competent jurisdiction for the ascertainment and adjudication of any claim which they may have under the Lakey deed to Kendall.

The applications of J. O. Gregg and Burlingame to intervene are denied and your office is directed to forthwith issue patent to Kendall pursuant to the decision of March 25, 1897. This is intended to take the place of departmental ruling of December 22, 1897 (not reported), which was recalled by letter of December 27, 1897.

SOLDIER'S HOMESTEAD—DECLARATORY STATEMENT—SETTLEMENT RIGHTS.

THOMAS *v.* REED ET AL.

Where one who files a soldier's homestead declaratory statement is also the prior settler, he may, at his election, make such settlement the basis of his right to the land by making application for the right of entry under the act of May 14, 1880, or he may permit the time fixed by said statute to expire and then make entry under his declaratory statement. In the former case his right relates back to the date of settlement, and in the latter to the date of filing declaratory statement.

The case of Chappell *v.* Clark, 27 L. D., 334, modified.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 15, 1898.* (G. C. R.)

Departmental decision of June 23, 1898, awarded to Daniel R. Thomas the S. ½ of the SE. ¼, Sec. 8, T. 22 N., R. 6 W., Enid, Oklahoma. Alexander Reed's entry for the SE. ¼ of said section was, by said decision,

canceled as to that part of the entry awarded to Thomas, and held intact as to the balance. Cannon's protest against Reed's entry was dismissed.

Both Cannon and Reed have filed their respective motions for review.

Cannon alleges generally that the Department erred in deciding that both Reed and Thomas settled on the land prior to the time he made his settlement.

The testimony in the record is very voluminous; its salient points are set out in the decision complained of; and that portion thereof which was addressed mainly to the issue as to who in fact first made settlement on the land, is very conflicting. It can be said that reasonable minds might differ as to a proper conclusion with respect to the main issue—prior settlement; but, as held by this Department, this will not of itself warrant, on motion for review, the setting aside of the decision complained of.

Upon due consideration of the grounds of error relating to the facts found by the Department, it is held that the motion is not well taken.

The motion, however, raises legal questions which will be more fully discussed.

The records show that on September 19, 1893, Alexander H. Reed filed soldier's declaratory statement No. 26 for the land.

On December 6, 1893, John P. Cannon made homestead entry thereof.

On December 11, 1893, Daniel R. Thomas filed his homestead application for the S. ½ of said SE. ¼, which was rejected for conflict with Cannon's entry.

On December 14, 1893, Reed made homestead entry therefor.

On December 15, 1893, Daniel R. Thomas filed his affidavit of contest against Reed's soldier's declaratory statement and entry based thereon, alleging settlement on the land at 12.50 p. m., and that he was the first *bona fide* settler, and made the first permanent and valuable improvements thereon. Attached to that affidavit was Thomas's second homestead application for the W. ½ of the said SE. ¼.

On January 10, 1894, Cannon filed a protest against Reed's entry and asked for a hearing.

The register and receiver, on February 14, 1894, issued a notice for a hearing on Cannon's protest; the hearing was fixed for March 16, 1894. The case was continued until May 5, 1894, at which time all parties (Reed, Cannon, and Thomas) were present and announced themselves ready for trial. Thereupon, Thomas filed an amended and supplemental affidavit, alleging prior settlement and residence on the S. ½ of said SE. ¼, and that he settled thereon at 12:50 p. m., on September 16, 1893, before said filing and entries were made. After motions were made by Cannon and Reed to dismiss Thomas's amended and supplemental affidavit, and the same were overruled, the testimony as to prior settlement was submitted, resulting, as above seen, in the action of the Department in concurring in that of the register and receiver, in find-

ing: 1. That Thomas settled first, and was entitled to the land applied for by him, namely, the S. ½ of said SE. ¼. 2. That Reed was the next settler in order of time, and was entitled to the N. ½ of said SE. ¼—his entry as to said S. ½ of the NE. ¼ to be canceled.

It is insisted, substantially, that Thomas (as against Cannon) failed to put his claim of record as required by section 2265 of the Revised Statutes; that Thomas's contest filed against Reed's entry, on December 15, 1893 (within three months of settlement), did not affect Cannon's right; that the hearing was ordered on Cannon's protest, and not on Thomas's contest; that the failure of Thomas to contest Cannon's entry within three months from the former's alleged settlement was fatal to Thomas's rights as against Cannon.

It is a sufficient reply to this position to say that despite any irregularity in this manner of proceeding all parties were present at the hearing, announced themselves ready for trial and participated in the trial, the controlling purpose and object of which was to determine who by reason of prior settlement had the better right. Under these circumstances it was proper to determine the rights of the respective parties in accordance with the evidence produced.

It is insisted that when on September 19, 1893, Reed filed his soldier's declaratory statement he thereby waived all rights which he might otherwise have obtained by his settlement made prior thereto. That when on December 14, 1893, he made entry of the land and based his application (in part) upon his soldier's declaratory statement, resulting in the cancellation of Cannon's entry made December 6, 1893, he thereby elected to rest his claim on his soldier's declaratory statement under section 2304, Revised Statutes, and could not be heard to assert his claim under section 3 of the act of May 14, 1880 (21 Stat., 140): that he could not be permitted to claim the benefit of both acts using his privilege under section 2304 to deprive Cannon of his entry and afterwards be heard to assert a claim as against Cannon's protest under the act of 1880, *supra*.

In support of this position the case of Thrailkill *v.* Long (26 L. D., 639), is referred to.

In that case Long had filed his soldier's declaratory statement April 20, 1892, and had made homestead entry thereunder October 17, 1892, nearly six months after his filing, whereupon Thrailkill's intervening entry was canceled. (5th paragraph, General Circular 1895, p. 23.) Thrailkill thereupon filed his affidavit of contest, alleging prior settlement. Long attempted to support his entry by a claim of prior settlement, but the fact that he did not make entry within three months after such claimed settlement, as provided by the act of May 14, 1880, *supra*, debarred him in the presence of an intervening adverse claim from claiming any right under such settlement. He was, therefore, reduced to the position of depending alone upon his soldier's declaratory statement, and could date his claim only from its filing, prior to

which time Thrailkill had made settlement, and so the Department in said decision says: "Failure (on Long's part) to comply with the requirements of the section (sec. 3, act of May 14, 1880, quoted), is fatal to the claim based on settlement." The decision further says:

> There is nothing to be found in these sections which was intended to, or does, relieve the soldier from his obligation to comply with the requirements of the act of May 14, 1880 (21 Stat., 140), where he makes settlement prior to filing soldier's declaratory statement, if he relies upon such settlement. The soldier's declaratory statement is no notice of prior settlement, but is notice of intention to settle and make entry within six months from date of filing. Long had a right on the opening of the Cheyenne and Arapahoe reservation to settlement—of which the land in question was a part—to compete with these who ran for it, and sought to initiate settlement right to it on the day of opening, and the fact that he availed himself of such right and made settlement on the day of opening neither abridged nor added to such right as he acquired by virtue of filing his soldier's declaratory statement.

Reed in the case at bar, like Long in the case cited, filed his soldier's declaratory statement; but Reed, unlike Long, made his homestead entry within three months from his settlement; moreover, his entry as shown by his homestead affidavit was made under section 2289 Revised Statutes, his receipt being given in the usual form under section 2290. This affidavit contained the statement that he settled on the land on the afternoon of September 16, 1893, "prior to settlement made by any and all other persons;" and that his residence was thereafter continuous, etc. All these averments were matters of record and both Cannon and Thomas were charged with notice thereof.

Cannon's protest, upon which the hearing was ordered, was not based upon the fact that he had settled on the land prior to the date upon which Reed filed his soldier's declaratory statement, but upon the distinct allegation that he "is the prior *bona fide* settler, and by reason of his priority of settlement, made prior to said filing and prior to any settlement made by said A. H. Reed." This protest also asked that if Reed offered to complete his soldier's declaratory statement (it was then completed) and make entry, etc., "a hearing may be ordered," etc. While Reed's application to make entry was accompanied by the usual affidavit under section 2289, he also filed an additional affidavit stating among other things that he had filed his soldier's declaratory statement for the land on September 19, 1893. All that he obtained or could obtain by his soldier's declaratory statement was a right of entry under section 2304, Revised Statutes—a right conferred exclusively because of his status as a soldier in the army of the United States during the recent rebellion. While that section contemplates settlement after the filing of the declaratory statement, it does not avoid the rights of a soldier under the act of 1880, held in common with all others. (Thrailkill *v.* Long, *supra*.)

The hearing was addressed to the issue as to which of the three (Cannon, Reed or Thomas), settled first, and was ordered in pursuance of Cannon's protest which raised that question, and that alone. While

Reed filed a soldier's declaratory statement, the whole record, including his sworn affidavit, shows that he also predicated his right to the land on his alleged prior settlement; in other words, his entry was based upon section 2289, Revised Statutes, and a compliance with the provisions of the act of May 14, 1880, *supra*.

The disadvantage which Cannon suffered by the irregular course which the proceedings in the local office seem to have taken is that he was required to assume the burden of proof notwithstanding he had obtained the first entry; but since he does not seem to have made any objection in the local office to this manner of proceeding, and since it was a matter which he could waive, he will not be permitted to urge it on appeal.

While sections 2304 and 2305 contemplate settlement subsequent to the filing of a soldier's declaratory statement, as therein provided, still, if the applicant is in fact the prior settler and makes his entry within three months as provided by the act of 1880, his right may be rightfully predicated upon his settlement and will not be held to depend exclusively upon his soldier's declaratory statement; in other words, the filing of a soldier's declaratory statement does not in itself work an abandonment of rights obtained by prior settlement.

This holding is made notwithstanding a statement in the decision of Chappell *v.* Clark (27 L. D., 334), which reads as follows:

> However, as Clark filed his soldier's declaratory statement on September 29, 1893, at a date when Chappell had undoubtedly settled upon the tract, it follows that the cases cited in your office decision are decisive of the case, even if Clark had been the prior settler, as he thereby waived any prior settlement made upon the tract, because his right to make settlement dated from such filing and he can not now, as against an intervening adverse claimant, take advantage of a settlement made prior thereto.

The cases of Wood *v.* Tyler (22 L. D., 679) and Pickard *v.* Cooley (19 L. D., 241), are referred to as supporting the statement quoted, but neither of these cases supports that doctrine, nor was the statement quoted necessary to the decision in that case.

Cooley, in the Pickard-Cooley case, had filed a soldier's declaratory statement April 26, 1889, but claimed the benefit of a settlement alleged to have been made prior thereto. Pickard made entry of the land July 19, 1889, and Cooley made entry thereof under his soldier's declaratory statement, October 17, 1889, nearly six months after filing such statement, and much more than three months after the date of his alleged settlement.

If Cooley had actually settled upon the land prior to Pickard and had entered the same within three months from the date of his settlement (as Reed did in the case at bar) a question different from that decided would have been presented. In the Pickard-Cooley case it is said:

> If the defendant Cooley had desired to initiate his claim by actual settlement and residence, with right of claim to date from time of such settlement and residence, *he should have filed entry upon the tract within ninety days from time of location and*

settlement, in order to avail himself of such right: but by locating homestead and filing soldiers' declaratory statement, as stated, on April 26, 1889, and making entry on October 17, 1889 (nearly six months thereafter), under provision of sections of the Revised Statutes above referred to, his inceptive right of entry dated from the day on which he filed his said declaration and not from the date of locating his homestead by settlement at 1:15 o'clock p. m., on April 22, 1889.

Under the facts of that case, Cooley lost any right obtained by his claimed prior settlement, by failing to make entry of the land within the required three months.

In the Wood–Tyler case (22 L. D., 679), Tyler, who claimed to be the prior settler, had filed a soldier's declaratory statement April 20, 1892, and made entry October 18, 1892, while Wood claimed under a settlement made April 19, 1892.

Under these facts the Department in the case says:

> In view of the fact that Tyler did not make entry nor apply to make entry of the land until October 18, 1892, more than three months after his alleged settlement, and subsequent to the entry of Wood, it is material, in the face of Wood's settlement, contest, and entry, when Tyler made his settlement. He must stand, as claimant for the land, either upon his rights under his soldier's declaratory statement, or, independent of them, upon his rights under his settlement and entry, or under his entry alone. However he may elect, the right of Wood is superior. Wood's settlement was prior to the filing of Tyler's statement, if Tyler elects to stand upon his statement. If he elects to stand upon his settlement and entry, even conceding, for the sake of the argument, that his settlement was prior to that of Wood, he was fatally in default in failing to make entry within three months of his settlement, as against Wood's contest and prior entry. If he stands upon his entry alone, Wood's right is obviously superior.

Had Tyler made entry within three months from his settlement and shown that he was in fact the prior settler, he might have won his case, notwithstanding the filing of his soldier's declaratory statement.

Had Reed, in the case at bar, postponed making entry until more than three months from the date of his settlement he would thereby have been compelled to rest upon his soldier's declaratory statement alone, which being filed after Cannon's settlement would have been subject thereto.

Where one who files a soldier's declaratory statement is also the prior settler, he may, at his election, make such settlement the basis of his right to the land by making application to make entry thereof under the act of May 14, 1880, *supra*, or he may permit that time to expire and then make entry under his declaratory statement. In the former case his right "shall relate back to the date of settlement the same as if he settled under the preemption laws," and in the latter case his right will relate back only to the date of filing his soldier's declaratory statement.

For the reasons here given the portion of the statement quoted from Chappell *v.* Clark, *supra*, which is in conflict with the views here expressed, is recalled.

Cannon's motion is denied.

Reed's motion for review, alleges error in a statement in said decision, viz., that since the appeal herein was filed, Reed filed (February 3, 1898,) his corroborated affidavit showing that Cannon abandoned the land and is believed to be now residing in California, etc., when in fact the affidavit alleged that Thomas had abandoned the land, etc. The error charged was made, the name of Cannon being inadvertently used instead of that of Thomas, and the error is now corrected, but abandonment like this, claimed to have occurred pending the appeal, can not be considered now but must be presented in the manner suggested in Griffin *v.* Smith (25 L. D., 329); Corbin *v.* Dorman (25 L. D., 471); Lark *v.* Livingston (26 L. D., 163).

SECOND HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

GREENWOOD *v.* GASTONQUAY.

On the relinquishment of a homestead entry, made prior to the enactment of March 2, 1889, a second entry of the same tract may be made by the entryman under the provisions of section 2 of said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 15, 1898.* (V. B.)

The case of James B. Greenwood *v.* Albert Gastonquay, involving the S. ½ of the NW. ¼ and the S. ½ of the NE. ¼ of Sec. 3, T. 163 N., R. 57 W., Grand Forks, North Dakota, is before the Department for consideration on the appeal of Greenwood from your office decision of February 24, 1897, adverse to him.

It appears that on January 7, 1886, said Gastonquay made homestead entry of the described land; thereafter, on December 10, 1892, he relinquished his entry, and immediately thereafter he applied, and was permitted, to make second homestead entry of the same land.

On October 26, 1895, Greenwood filed an affidavit of contest alleging that said entry was illegal for the reason that before making it Gastonquay had exhausted his homestead right. A hearing was duly had, and the case was submitted by both parties on the following agreed statement of facts:

I.

That heretofore, to wit: On October 31st, 1885, Albert Gastonquay, the contestee herein did settle upon and improve the land herein in dispute, to wit: the S. ½ of the NE. ¼, and S. ½ NW. ¼ of section 3, T. 163, R. 57.

II.

That thereafter and in pursuance of such settlement the said Albert Gastonquay did make his homestead entry in proper form for said land, the same being numbered 9550 and allowed January 7th, 1886.

III.

That thereafter and on Dec. 10th, 1892, the said homestead entry 9550 was canceled in the said local land office upon a relinquishment thereof duly executed by the said Albert Gastonquay and filed in said office.

IV.

That thereafter and on said December 10th, 1892, the said Albert Gastonquay made his homestead entry 12317 for said land, the same purporting to be made under authority of act of March 2nd, 1889.

V.

That the said Albert Gastonquay is a married man with a family of four children and that with said family he has lived and has made his sole home upon said land at all times since October 31st, 1885.

VI.

That the said Albert Gastonquay has broken one hundred (100) acres of said land and has the same ready for crop during the coming season and that he has cropped said land each and every year since his settlement on the same.

VII.

That the said Albert Gastonquay has upon said land a good dwelling house, stable, granarys, pasture, wells, etc., and that all of said improvements aggregate in value at least $1500.00.

On February 28, 1896, the register and receiver recommended that the contest be dismissed and the entry remain intact. On January 9, 1897, your office approved this action of the local officers, and, on review, February 24, 1897, adhered to your former decision dismissing the contest of Greenwood, but modified your ruling to the extent or requiring Gastonquay to make final proof on his claim within sixty days from notice, with a view of submitting "the claim" to the Board of Equitable Adjudication for confirmation. From your action in the premises Greenwood appealed.

It will be seen from the aforegoing agreed statement of facts that Gastonquay lived upon and cultivated the land in controversy since the time of his first entry thereof in 1885; that it was the sole home of himself and family, and that he has improvements which "aggregate in value at least $1,500" thereon.

On appeal from your office four specifications of error are presented, and, without dealing with them in detail, they present substantially only one question for consideration: Is the second entry of Gastonquay allowable under existing law?

The act of March 2, 1889 (25 Stat., 854), declares:

That any person who has not heretofore perfected title to a tract of land on which he has made entry under the homestead law, may make a homestead entry of not exceeding one quarter section of public land, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated, etc.

Prior to the passage of this act the holding of the Department was that a person who once made homestead entry thereby exhausted his homestead right and would not be permitted thereafter to make another such entry. This was the general rule, adhered to through a long series of years, though sometimes it was relaxed in exceptional cases, which are well defined in the departmental rulings. As Gastonquay's case

can not be brought within any of the exceptional cases, his right to make second entry, if he has such right, must be brought within the provisions of the act just cited.

Several decisions of the Department have been made construing said section and act, but the leading decision, and the one bearing more directly upon this case is that of Hertzke *v.* Henermond, 25 L. D., 82.

In that case, as in this, the homestead entry was made prior to the passage of said act, voluntarily relinquished after that time, and application for second entry made and allowed. The Department held (syllabus):

> Section 2, act of March 2, 1889, provides for the allowance of a second homestead entry in any case in which the applicant, prior to the enactment of the statute, made entry under the homstead law but has not perfected title thereunder, either before or since that time.

It is strenuously insisted that the decision cited does not control the case now under consideration, inasmuch as in that case the second application was for another and different tract of land than the one described in the first entry of Henermond, whilst in this case Gastonquay's second entry is of the same tract he originally entered and relinquished. In other words, it is insisted that the statute does not permit the second entry of the same tract by a party who had formerly entered it.

There is no expression in the statute to sustain this contention. The language employed is unrestricted and plain in this respect. It is that "any person who has not perfected title," etc., may make a homestead entry of "one quarter section of public land." Gastonquay is a person who has not perfected title under the homestead law to a tract of land, and has made homestead entry of a quarter section of public land. Clearly he comes within the plain language of these provisions of the act, and to hold to the contrary thereof it would be necessary to interpolate words into the text of the act, prohibiting re-entry of the same tract by the same party, a thing which the Department would not be justified in doing.

It is urged that, in effect, such interpolation is necessary, inasmuch as under well settled rules of construction statutes should never be so construed as to lead to absurd results, and that a departure from the words of a statute, or the interpolation of words therein, is warranted to avoid results of this character.

It is insisted in this behalf that the purpose Gastonquay had in view in relinquishing and re-entering the same tract was to hold the land during the lifetime of the second entry, exempt from State and local taxation after having so held it during the years of his first entry, and that by a similar process of relinquishment and re-entry the same tract might be exempted from taxation continually; and it is urged that Congress could not have intended so absurd and unjust a result, and therefore that the statute should be so construed as to prevent the mischief complained of.

There is nothing in the record to justify the assertion that the purpose of Gastonquay was to escape taxation; and if imagination may be indulged in, good and sufficient reasons for his action might be suggested without ascribing to him motives deemed to be improper.

In dealing with so serious a matter as the construction of a statute, it is not proper for this Department to be influenced in its judgment by imaginary results. In reference to such contentions the Supreme Court, in the case of the United States *v.* Lee, 106 U. S., 196–217, has well said:

> Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depend the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.

But it is not seen how, if the construction contended for were adopted, the State would be bettered or enabled sooner to tax what are now public lands. If Gastonquay's entry of this particular tract were canceled, some other party could enter the same and hold it free of taxes during the lifetime of his entry, and Gastonquay, it is conceded, could enter another tract and hold that during the continuance of the entry.

It must be evident from this that Congress when legislating in relation to the diposal of the public lands did so without any special reference to the subject of State taxation, and there is no contract with the State otherwise.

Possibly there may be good reasons why the law should be otherwise than Congress has said it shall be; but it is not for this Department to consider such reasons. For, in the language of the supreme court (United States *v.* Union Pacific R. R. Co., 91 U. S., 73–91).

> The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit and intention, leave, in our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended.

Entertaining these views, the contest of Greenwood is dismissed and the entry of Gastonquay will remain intact.

In your said decision you required the entryman to make final proof within sixty days from notice, with a view of submitting the case to the board of equitable adjudication for confirmation. In this, error was committed. Gastonquay's former entry having been canceled and he having made another entry, he is entitled to the full lifetime of his entry within which to submit final proof. But it appearing that since the case has been pending here he has submitted his final proof, no sufficient reason exists why the same may not be considered, and, if satisfactory, approved, final certificate given and patent issued thereon. In considering said proof the former entry of Gastonquay should be no bar to his claim of settlement and residence during its continuance.

Thus modified your judgment is affirmed.

RAILROAD GRANT—INDEMNITY SELECTION—ADVERSE CLAIM.

STATE OF CALIFORNIA *v.* SOUTHERN PACIFIC R. R. CO.

A railroad indemnity selection tendered for land that is embraced at such time within a prior existing entry is properly rejected; and an appeal from such action secures no right under said selection that will attach on the subsequent relinquishment of said entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 15, 1898.* (F. W. C.)

The State of California has appealed from your office decision of April 20, 1896, rejecting its application to select as school indemnity the S. ½ of the NE. ¼ and the S. ½ of the NW. ¼ of Sec. 3, T. 17 S., R. 16 E., Visalia land district, California, for conflict with the selection proffered for said tract by the Southern Pacific Railroad Company.

This tract is within the indemnity limits of the grant for said company and was included in the list of selections proffered by the company October 4, 1887, which list was rejected by the local officers for conflict with the timber-culture entry of K. M. Bell, made March 26, 1887, covering said land. From the rejection of its selection list the company duly appealed.

On January 27, 1892, the selection by the State was tendered, accompanied by a relinquishment of Bell's timber-culture entry.

Your office decision held that the company's right under its selection list attached immediately upon the relinquishment of Bell's entry and related back as of the date of tender, October 4, 1887, and therefore took precedence over the selection made on behalf of the State. From said decision the State has appealed.

It is urged on behalf of the company that as the tract above described was included in the withdrawal made in 1867, on account of its grant, the allowance of Bell's timber-culture entry was in violation of law and therefore no bar to the company's selection.

It has been repeatedly held by this Department, however, that the indemnity withdrawal made on account of the grant to aid in the construction of the Southern Pacific railroad was in violation of the terms of said grant and therefore illegal and of no operative effect except to mark the limits within which selections might be made on account of the grant. (Southern Pacific R. R. Co. *v.* Kanawyer, 23 L. D., 500.)

Following this holding by the Department, Bell's timber-culture entry was properly allowed, and while of record was a bar to the selection on account of the grant. The rejection of the company's indemnity list tendered October 4, 1887, was therefore proper, and the company gained nothing by its appeal from such rejection.

As before stated, accompanying the State's list of selections was filed Bell's relinquishment, which relieved the land from the effect of said entry, and it is therefore properly subject to the State's selection, and said selection should have been accepted and permitted to go of record.

Your office decision is therefore reversed, the State will be advised of its right to complete selection of this tract, and the proffered selection by the railroad company will stand rejected.

IRONS *v.* BALDOCK.

Motion for review of departmental decision of August 12, 1898, denied by Acting Secretary Ryan, October 15, 1898.

RAILROAD GRANT—INDEMNITY—SELECTION—PRE-EMPTION FILING.

NORTHERN PACIFIC R. R. CO. *v.* TEMPLETON.

A railroad indemnity selection permitted, under the rulings then in force, to go of record for a tract of unoffered land embraced within an expired, though uncanceled, pre-emption filing is notice to all who may thereafter attempt to initiate a claim to said land, and may be approved, where it appears that the pre-emptor had in fact abandoned the land prior to its selection by the company.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 15, 1898.* (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of December 17, 1896, holding for cancellation its indemnity selections covering the SW. ¼ of Sec. 21, T. 15 N., R. 42 E., Walla Walla land district, Washington.

This land was within the limits of the withdrawal ordered upon the map of amended general route of the main line of said road, which map was filed February 21, 1872, but upon the definite location of the road October 4, 1880, it fell within the indemnity limits. The N. ½ of the SW. ¼ and the SE. ¼ of the SW. ¼ of said section was selected by the company December 17, 1883, and the SW. ¼ of the SW. ¼ of said section was selected April 20, 1885.

The present case arose upon an application filed by Anna Templeton on November 12, 1894, to make entry of the land under the homestead laws, in support of which she alleged that her husband had settled upon the land prior to the company's selection and had continued to hold and farm the same until his death in December, 1888, since which time she has occupied and improved the tract.

The records show that one James Chamberlin filed pre-emption declaratory statement embracing the SW. ¼ of the SW. ¼ of said section together with other lands in said township, on February 12, 1874, in which statement settlement was alleged February 16, 1872. This filing has never been completed, but is still of record uncanceled, and the land is unoffered.

Your office decision held that said filing was a bar to the company's selection as to the said SW. ¼ of the SW. ¼ of Sec. 21, and from a

review of the testimony taken at the hearing had upon the allegation of settlement made in support of Mrs. Templeton's application, found that—

It is shown by competent testimony that the husband of the contestant was residing upon this land, cultivating and improving it, at the date of the company's selection in 1883, and upon his death the widow succeeded to his rights and is entitled to perfect, upon due compliance with the settlement laws, the claim thus initiated.

From said decision the company has appealed to this Department.

A review of the record does not support the finding made in your office decision. It appears that Chamberlin, whose filing covered the SW. ¼ of the SW. ¼ of said Sec. 21, was succeeded in possession by one Peck in 1876, who sold his possessory claim, which included not only the tract applied for by Mrs. Templeton but also one hundred and sixty acres in the adjoining even-numbered section, to the Templeton brothers; that at the time of said purchase Samuel Templeton, the husband of the present applicant, was residing upon a tract for which he was making claim under the pre-emption law, distant about a mile and a half from the tract here in controversy; that he made proof upon said pre-emption claim in December, 1883, and that he continued to reside upon said tract to the date of his death in December, 1888. His brother appears to have taken possession of the tract here involved, but Samuel Templeton never at any time resided upon the tract here involved or made claim thereto otherwise than being interested in cropping the land.

Through an arrangement, whether by purchase or as tenant is not shown, one Jacob Price occupied this land for something like two years before the death of Samuel Templeton, and the present applicant had to buy him off before she moved upon the land following the death of her husband.

From the above it is clear that Samuel Templeton had no such claim to the land at the date of the company's selection as would bar the allowance of the same, and the present applicant therefore succeeded to no right as against the company's selection, nor was any right created by her residence and improvement after the company's selection.

It but remains to consider the effect of the preemption filing by James Chamberlin covering the SW. ¼ of the SW. ¼ of said section 21, which filing, although it had expired long prior to the selection by the company, was nevertheless of record, uncanceled, at the date of the presentation of said list.

The company's selection list embracing this tract was accepted by the local officers and permitted to go of record. Such action was proper under the rulings then in force and the selection was notice to all who attempted to initiate a claim thereafter.

The record made in this case evidences that Chamberlin had long prior to the selection in question abandoned the land, and the circum-

stances are not such as to warrant the withholding of approval of the company's selection on account thereof.

Your office decision is therefore reversed, and you will notify Anna Templeton, claimant against said railroad company, or her right to transfer her claim to other lands in lieu thereof, as provided by the act of July 1, 1898 (30 Stat., 620); and in the event she declines this option the railroad company will, under the provisions of said act, be duly invited to relinquish the land herein claimed and to select other lands in lieu thereof.

RAILROAD GRANT—INDEMNITY SELECTION—CORRECTION OF LIST.

MEYER *v.* ST. PAUL AND NORTHERN PACIFIC R. R. CO.

If a railroad company desires to correct a list of indemnity selections it should first file application for permission to make such correction, which should be considered by the General Land Office having due regard for intervening rights.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 18, 1898.* (C. J. W.)

In your office decisions of August 17, 1896, and January 27, 1897, the selection list of the St. Paul and Northern Pacific Railroad Company was held for cancellation, in so far as the same applied to the N. ½ of the SE. ¼ and the fractional SW. ¼ of Sec. 7, T. 40 N., R. 29 W., St. Cloud land district, Minnesota, for the reasons therein stated.

The railroad company appealed to the Department from said decisions, which were affirmed on August 25, 1898 (not reported).

The company has filed a motion for review of said departmental decision, in which it is alleged that the failure to assign a basis for the tract in question in its rearranged list of February 12, 1892, was a clerical error which it corrected in 1897. No correction of the alleged mistake has been made which can be recognized by the Department. The rearranged list, filed on February 12, 1892, is unchanged, but in the rearranged list of December 4, 1889, the company or some one else seems to have attempted a correction since the same was filed (the date of the change not appearing) by changing the township from 39 to 40. This is supposed to be the attempted correction of 1897 referred to in the motion. The tract is still omitted from the list of February 12, 1892, in which the company's selections and losses are arranged tract for tract. If the company desires to correct its list, it must first file proper application for leave to do so, which your office will consider, having due regard to intervening rights.

The motion is denied.

HOMESTEAD ENTRY—QUALIFICATION OF ENTRYMAN—OWNERSHIP OF LAND.

HEATH *v.* DOTSON.

It is not a violation of the acts of May 2, 1890, or March 3, 1891, for the owner of one hundred and sixty acres or more, to dispose of such part of said land as will enable him to make the oath required of homestead applicants under the law and departmental regulations, provided the sale is final and made in good faith.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 18, 1898.* (C. J. W.)

On December 24, 1894, William S. Dotson made homestead entry for the S. ½ of the N. E. ¼, and lots 1 and 2, Sec. 2, T. 21 N., R. 6 W., Enid, Oklahoma.

On May 2, 1895, D. C. Heath filed affidavit of contest against said entry, on the alleged ground that Dotson was at the time he made said entry the owner in fee simple of one hundred and sixty acres of land in the State of Missouri, and the entry was therefore void.

A hearing was had, which resulted in a decision by the local officers favorable to the entryman, in which they recommended the dismissal of the contest.

The contestant appealed, and on December 26, 1896, your office affirmed the local office and dismissed the contest, whereupon the contestant appealed to the Department.

It appears that the entryman was cognizant of the fact that ownership of one hundred and sixty acres of land in any of the States or Territories of the United States would disqualify him as a homestead entryman in Oklahoma, and being desirous of securing a home in said Territory, and at the same time being the owner of two hundred and nine acres of land in Missouri, he sold fifty acres of the Missouri land, chiefly for the purpose of qualifying himself, and thereafter went to the Cherokee Outlet and purchased improvements on the land in question, and made entry for it. There is no controversy as to the quantity of land originally owned by him, or as to the fact of its acreage being decreased to less than one hundred and sixty acres, if his sale was valid. It appears that before going to Oklahoma he sold and conveyed to B. F. Gilbert fifty acres of his Missouri land, taking his note payable in two years, the payment of which was secured by a mortgage deed on the land conveyed. The deed conveying the fifty acres, it appears, was not recorded until the day after the defendant was served with notice of contest, and the failure to record is urged as evidence of its fraudulent character. Both parties to the transaction testified at the hearing, and with such candor as to make it clear that the trade between them was genuine and passed the title to Gilbert, and that the failure to record the deed earlier was attributable to negligence rather than design. Record of the deed was not requisite to give it validity. It is

shown to have been executed and delivered at the time it purports to have been, which time was prior to that at which Dotson made the entry in question. It was the execution and delivery of the deed which passed the title, and not its subsequent record.

Neither the act of May 2, 1890 (26 Stat., 81), nor that of March 3, 1891 (26 Stat., 1026), in so far as they deny the right of entry to persons who at the time are the owners of one hundred and sixty acres of land in any of the States or Territories, was intended to operate as a restraint upon the sale of lands, nor is it a violation of either of said acts for the owner of one hundred and sixty acres or more to dispose of such part of them as will enable him to make the oath required of homestead applicants, in Oklahoma, under the law and departmental regulation, provided the sale is final and in good faith. Such seems to have been the character of the sale under consideration.

It is insisted that the defendant retains such interest in the land sold, by virtue of his mortgage deed, as still makes him the owner or proprietor within the meaning of the law. If this position were tenable, which is not conceded, it would prove too much, since under that rule it would appear that the defendant was not the owner of the land sold at the time he accepted the mortgage deed from Gilbert, inasmuch as the record discloses the fact that, on March 31, 1894, William S. Dotson and his wife executed a similar mortgage or trust deed for sixty acres of the Missouri land including the fifty acres in question, to Ezra H. Frisbie, trustee of Harriet Coombs, which was outstanding and not satisfied at the date of Gilbert's mortgage to Dotson. This latter mortgage appears from the evidence to have been executed for Coombs' benefit and to secure the payment of the debt due to her under the one of March 31, 1894.

The record fully supports the conclusion reached by both your office and the local office, and your office decision is accordingly affirmed.

Santa Fe Pacific R. R. Co.

Hearing ordered by Acting Secretary Ryan, October 15, 1898, on showing made by the company. See departmental decision of August 12, 1898, 27 L. D., 322.

VACANCY IN LOCAL OFFICE—RULE TO SHOW CAUSE—CANCELLATION.

Kuper *v.* Fry.

A vacancy in the office of receiver does not prevent filing an answer under a rule to show cause why an entry should not be canceled; final action however on such matter being held in abeyance until the vacancy is filled.

An entryman who fails to respond to a rule to show cause why his entry should not be canceled, or appeal from such order, is not, after the cancellation of his entry and the intervention of an adverse right, entitled to a reinstatement on the ground that he was not notified of the final order of cancellation.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 18, 1898.* (H. G.)

Christian C. Kuper appeals from the decision of your office of March 27, 1897, directing that he be notified that he will be allowed sixty days from service of notice thereof to show cause why his homestead entry, made December 2, 1896, for the NW. ¼ of Sec. 27, T. 103 N., R. 48 W., in the Mitchell, South Dakota, land district, should not be canceled.

William H. Fry, on January 31, 1879, made timber culture entry for the same tract. He failed to submit his final proof thereon, and on May 26, 1896, he was served, at the direction of your office, with notice that he had allowed the limitation of time provided by statute within which to make final proof to expire without making the same, and that he would be allowed thirty days from the date of service of such notice upon him within which to show cause why his claim should not be declared forfeited and his entry canceled. The local office reported to your office, after the expiration of such period, that no action had been taken by the claimant in response to said notice, and, on August 19, 1896, your office canceled his entry.

On February 1, 1897, after Kuper had made homestead entry for the tract, Fry filed his application for reinstatement of his entry, duly verified and corroborated. He asserts therein a substantial compliance with the law, and states that under an agreement with his brother, Isaac N. Fry, the latter planted, cultivated and cared for the trees upon the tract, and agreed to pay all expenses incurred therein and also the money with which to make final proof, in consideration of the use of that part of the tract not planted to trees, and all the crops raised thereon. He admits having received notice of the letter notifying him of his failure to make final proof within the statutory period, and to show cause why his entry should not be canceled, but denies that he ever received notice of the cancellation of his entry. His brother, who was in charge of the tract, corroborates this affidavit, and states that when he received notice regarding the final proof from the entryman, in the latter part of June, 1896, he went to the land office, and found it closed on account of the death of the late receiver thereof; thereupon, he states that he employed an attorney to notify him immediately upon the opening of the land office for the resumption of business, but never received any notification, either from the attorney or from the land office, until he was informed, on December 10, 1896, by Kuper, the present entryman, of the entry of the latter. He further states that he had been informed and believed that it would be necessary for his brother, the timber culture entryman, to appear and make proofs at the land office, and was not aware that the final proof could be made out of the

State, his brother being a non-resident; and that owing to drouth and failure of the crops, and his inability to borrow money, he was unable to raise money for the purpose of meeting the expenses of his brother's final proof. The affidavits of the Fry brothers are corroborated as to the improvement of the tract and the attempted compliance with the timber culture law.

Your office found that the receiver of the local office died June 6, 1896, fourteen days after the notice to show cause why his entry should not be canceled was sent to Fry, and four days before the latter received it, and that the successor of said deceased official qualified and entered upon the duties of his office August 22, 1896, and held that Fry, the timber culture entryman, must be allowed ten days in addition to the time specified in the notice, allowed for transmission by mail of the notice to show cause and "for travel," to respond to the requirements of such notice, which would make the time forty days from May 23, 1896, the date of the notice, if nothing had intervened to suspend the running of such time; that during the vacancy in the office of the receiver, Fry could not have been heard in response to the rule to show cause, as in order to do so he would have the right to introduce witnesses before both officers, to be represented by counsel, to be heard by oral as well as by written argument, and to have all motions and questions arising therefrom passed upon by the register and receiver; that such proceedings being judicial and not ministerial or clerical, the register alone could not hear or dispose of such matters; and that therefore the running of time upon the order or rule to show cause stood suspended from June 6, 1896, to August 22, 1896, during which period there was a vacancy in the office of receiver.

The entry was canceled by your office on August 19, 1896, without its attention being called to the fact of such vacancy, three days before the vacancy ceased to exist and twenty-nine days before the expiration of the alleged legal period allowed Fry in which to make answer to said order to show cause. Your office held that the cancellation of Fry's timber culture entry was, therefore, premature. As the homestead entry of Kuper of record could not be canceled without giving notice to him, your office held that Fry's entry could not be reinstated until Kuper's intervening entry had been canceled upon due notice to him, and notice was directed accordingly to be given to Kuper to show cause why his entry should not be canceled.

Over sixteen years had elapsed from the time that Fry made his timber culture entry before your office called upon him to show cause why his entry should not be canceled, and no sufficient reason appears for such a delay in submitting final proof.

It does not appear that the vacancy for the period of seventy-seven days in the office of receiver of the local office could have interrupted entirely the business of the office. Undoubtedly such an interregnum operates as a suspension of all business requiring the joint act of the

two officials, except where, perhaps, the remaining incumbent was charged with the duties of both, but the receipt of papers, applications to enter, applications to contest entries, and all other applications could have been filed with the register during this period to await the action of the two officers, when the vacancy in the receivership was filled.

The response to the order to show cause is generally made in writing, accompanied by affidavits in support thereof, setting forth the reasons for the delay, and a hearing may or may not be ordered thereon, as the showing made requires. The case at bar was *ex parte*, and could have been submitted upon such a showing as has been made in the application for the reinstatement of the canceled entry now under consideration.

Such an answer or showing could have been filed with the register during the vacancy in the office of receiver, as such filing would have been a ministerial act, and one not involving the exercise of judicial discretion nor requiring the determination of both of the officials of the local office. If it had been necessary, after the vacancy had been filled, a hearing could have been ordered thereon, or other disposition could have been made of the case. Until that time, the matters presented would have been held in abeyance. (See Price *v.* Riley *et al.*, 26 L. D., 363, and cases there cited.) It is, however, alleged in the affidavit of Henry N. Fry, the brother and agent of the entryman, that the land office was closed on June 20, 1896, owing to the death of the receiver on the sixth day of that month, but this allegation is negatived in the report of the local office, addressed to your office on February 8, 1897, which, among other things, contains the following pertinent statement:

> Referring to the statement made by Isaac N. Fry, on the fourth page of his affidavit, the register desires to state for himself and in behalf of the clerical force of this office, that at no time during the vacancy which existed in this office, caused by the death of the late receiver, Hon. Richard H. Welch, was there any word given out, or statement made by any one connected with this office, that no final proof testimony would be submitted during said vacancy. On the contrary, all were notified that under the act of October 1, 1890, all final proofs would be taken in the absence of any contest or protest. The register also states that he has been informed by F. D. Powers, Esq., of this city, that he has no recollection that said Fry made any attempt to submit any final proof testimony in behalf of the claimant. The above explanation is given in order to relieve this office from any censure or criticism which might be inferred or deduced when said affidavit is under consideration by your office.

It does not sufficiently appear under the application for reinstatement filed by Fry that he could not have made his showing of excuse to the local office, or that the register refused to accept the same. His brother, acting as his agent, states that the land office was closed at the time the former went there after service of the notice to show cause. This is, in effect, contradicted by the report of the local office. The allegation that a certain attorney was employed to notify such agent when the land office was ready to resume business is denied by the attorney named, who asserts in his affidavit that during the year 1896,

in which all of the proceedings relating to the cancellation of Fry's entry occurred, at no time was he "employed or engaged in any manner to do any business whatever for Isaac N. Fry or William H. Fry," his agent or brother, concerning the tract in dispute, nor by any person for them or either of them.

In the case at bar, the entryman was in default and his entry was subject to cancellation for his failure to make final proof after due notice of his default and an opportunity to furnish reasonable excuse for his laches. He had the right to appeal from such an order, which became effective upon his failure to submit his reasons for the default, and it was not necessary that he should be served with notice of the cancellation of his entry for the purpose of affording him an opportunity to appeal, as he had the right to appeal from the order to show cause. (Walk *v.* Beaty, 26 L. D., 54–55.)

It will be noticed that the right of Kuper to appeal from the order of your office directing him to show cause why his entry should not be canceled, is not questioned. Fry is in the same position, as he could have appealed from a like order. He has not attacked the validity of the judgment of cancellation nor the lack of sufficiency of notice of the order to show cause. He asks for a reinstatement of his entry upon the showing made, and evidently relies upon the absence of notice of the cancellation of his entry. He was informed, however, in the order or rule to show cause, that he was in default, and he was given time within which to show cause why his claim should not be declared forfeited and his entry canceled, and this notice was, in effect, a notification to him that his entry would be canceled upon his failure to respond to the rule.

It follows that the entry of Fry was rightfully canceled. His application for reinstatement was filed after the homestead entry of Kuper was allowed, and the entry of the latter became of record after Fry's entry had been canceled. This application is based upon the lack of notice of the cancellation of the entry, the allegation that the local office was closed at the time Fry's brother as his agent went there after notice had been received of the order to show cause, and because the attorney alleged to have been employed to notify such agent of the resumption of business in the local office did not follow his instructions. Both of these allegations are negatived, the former one by the report of the local office, and the latter by the affidavit of the attorney.

The decision of your office is reversed. The application of William H. Fry for the reinstatement of his timber culture entry is denied.

Your order issued to Christian Kuper to show cause why his homestead entry should not be canceled is vacated and set aside, and his homestead entry will remain intact.

RAILROAD LANDS—ACTS OF MARCH 2, 1896, AND MARCH 3, 1887.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

By the provisions of section 1, act of March 2, 1896, the title to lands erroneously patented on account of a railroad grant, and sold by the company, is confirmed in the purchaser, on satisfactory showing as to the bona fide character of such sale and purchase.

Confirmatory action under said section, as to lands embraced within an entry that has been erroneously canceled on account of a railroad grant, will not be taken until notice of the application for confirmation is served on the entryman, with a view to his being heard on the right to a reinstatement of his entry under section 3, act of March 3, 1887.

Where the title to lands is held confirmed under said section, and a demand is made upon the company for the value of said lands, the minimum government price thereof will be treated, for the purposes of such demand, as the value of the lands.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 21, 1898.* (G. B. G.)

Acting under departmental instructions of July 29, 1892, your office, on August 19, 1892, made demand upon the Chicago, Milwaukee and St. Paul Railway Company under the act of March 3, 1887 (24 Stat., 556), for the reconveyance to the United States of certain lands within the State of Iowa which had been erroneously patented to said company under the act of May 12, 1864 (13 Stat., 72), the company having previously been given opportunity to show cause why such action should not be taken, and having failed to assign sufficient reasons.

The Department is now in receipt of your office letter of July 23, 1898, wherein it is said that no answer has been made to the aforesaid demand, but that the case has not been since reported to the Department, for the reason that it appeared from the papers filed by the company that the lands had been sold to *bona fide* purchasers, and upon evidence of that fact would, therefore, come within the terms of the act of March 2, 1896 (29 Stat., 42); that your office on August 15, 1896, called upon the company to make showing, within sixty days, of the *bona fide* sale of the lands as alleged by it; that on February 8, 1897, the company submitted such showing, which appears to be satisfactory, and it is recommended that the title to certain lands, set out in a list accompanying the recommendation, be confirmed in the purchasers, and that directions be given that demand be made upon the company for the government price thereof.

The lands embraced in said list are described as follows:

[Description of lands aggregating in area 4,314.81 acres omitted.]

From the affidavits of the land commissioner and assistant land commissioner of the Chicago, Milwaukee and St. Paul Railway Company, it appears that all of the above described tracts of land have been patented by the United States to the State of Iowa for the benefit of said

railway company, patented by the said State to the company, and sold for a valuable consideration by the company to various parties and conveyances executed, except as to the NE. ¼ of the SE. ¼ of Sec. 31, T. 97, R. 31, for which deed has not yet issued on account of the death of the purchaser and the unsettled condition of his estate.

By departmental letter of September 19, 1898, your office was directed to report to the Department whether it appears from the records of your office that the homestead or preemption entry of any *bona fide* settler, covering any lands embraced in the foregoing list, was erroneously canceled on account of the grant of May 12, 1864, for the Chicago, Milwaukee and St. Paul Railway Company, or any withdrawal made thereunder: this to the end that any such entryman be notified of the application for confirmation of title and be allowed a reasonable time within which to apply for a reinstatement of his entry under the 3d section of the act of March 3, 1887, *supra*.

Under date of October 4, 1898, your office reports that an examination has been made as directed, and that only one tract embraced in said list was embraced in an entry canceled on account of said grant or any withdrawal made thereunder: to wit, the NE. ¼ of the NW. ¼ of Sec. 21, T. 97 N., R. 28 W.; that it appears that one William A. McAllister made soldier's homestead entry for this tract, with other lands, June 16, 1865, upon which final certificate issued in the name of "the heirs of Wm. A. McAllister," October 4, 1870, and that this entry was canceled August 1, 1872, "for the reason that the land embraced therein falls within the ten miles limit of the McGregor and Western Railroad, and being an odd numbered section is included within the grant under the act of May 12, 1864;" that the records of your office further show that the NE. ¼ of the NW. ¼, aforesaid, was selected as "swamp" August 22, 1859, which selection remained of record until rejected, April 11, 1872, thus excepting the land from the grant to the railroad company whose line opposite the tract in question was definitely located August 30, 1864.

It thus appears that the cancellation of said entry for the reason stated was erroneous. This being so, it may be that parties claiming under the final certificate of McAllister are entitled to the protection of the said 3d section of the act of 1887, and have a better right than purchasers from the Chicago, Milwaukee and St. Paul Railway Company, and for this reason the question of confirmation as to the said NE. ¼ of the NW. ¼ will be held in abeyance for future consideration.

Section 1 of the act of March 2, 1896, provides, among other things, as to lands for which patents had theretofore erroneously issued under a railroad grant, that: "No patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

The evidence of sale and purchase of the lands embraced in the foregoing list is satisfactory to the Department. The title of the purchasers

thereof is confirmed by said act, except as to the NE. ¼ of the NW. ¼ aforesaid, and your office is hereby directed to make demand under the statute upon said company for the value of the lands, the title to which is herein held confirmed, as the basis of a suit against the company, in the event the demand is not complied with. For the purpose of such demand the minimum government price thereof will be treated as the value of the lands.

Your office will further advise the railroad company that before the Department will consider its application for confirmation of title as to the said NE. ¼ of the NW. ¼ of Sec. 21, T. 97 N., R. 28 W., the company will be required to serve notice of its application upon the heirs of Wm. A. McAllister, or the claimants under his entry erroneously canceled as aforesaid, if any there be.

INDIAN ALLOTMENT—CONTEST—APPLICATION TO ENTER.

WILLIAM J. COWLING.*

Land included in a suspended Indian allotment is not open to purchase under the timber land law; nor will a contest against said allotment, filed subsequent to the order of suspension, be entertained.

Secretary Bliss to the Commissioner of the General Land Office, April 13, 1898.

(W. V. D.) (P. J. C.)

It appears that Julia Sutherland made allotment application, No. 54, March 9, 1889, for land described as the NW. ¼ of Sec. 26, T. 64 N., R. 13 W., Duluth, Minnesota, land district, and that Alice Sutherland on the same date made a similar application, No. 60, for land which was afterwards adjusted to survey to describe the NE. ¼ of the SW. ¼ and lot 3 of the same section.

On February 13, 1894, Klaus Holmstrom and Alof Hellstrom, respectively, filed affidavits of contest against said allotments, alleging that the land was only valuable for the timber thereon.

It is stated in your office letter that "on Dec. 6, 1895, all Duluth allotment applications were suspended."

Your office, on April 19, 1897, held application No. 60, for cancellation on the report of special agent, and directed that the contestant against that allotment would "be permitted to exercise any right accruing to him from his contest." A hearing was ordered between Holmstrom and Alice Sutherland (in relation to allotment application No. 58, of land in the same section but not in controversy here) and between Hellstrom and Julia Sutherland.

On May 7, 1897, the local office forwarded the application of William J. Cowling to purchase under the timber land law the W. ½ of the NW. ¼, the SE. ¼ of the NW. ¼ and the NE. ¼ of the SW. ¼ of said section,

*Not reported in volume current with decision.

and also his affidavit of contest against allotment applications No. 54 and 60.

By decision of July 26, 1897, your office rejected the application to contest, because the same was filed "subsequent to the suspension of of the allotments in question by the Secretary," and also rejected his application to purchase.

From this action Cowling has appealed.

From an examination of the record it is concluded that there is no error in the action of your office in rejecting Cowling's said applications to purchase and to contest, and the judgment of your office in relation thereto is hereby affirmed.

CONTEST—CORROBORATORY AFFIDAVIT—DURESS.

IRWIN *v.* HAYDEN.

The purpose of the rule requiring an affidavit of contest to be corroborated is to assure the government of the good faith of the contestant, and not that jurisdiction may be vested in the local officers, that being obtained by service of notice only.

Non-compliance with the law will not be excused on the ground of intimidation, where it is apparent from the conduct of the party that the alleged threats did not lead him to believe that he was in danger of bodily injury.

Secretary Bliss to the Commissioner of the General Land Office, October (F. L. C.) *25, 1898.* (C. W. P.)

October 24, 1893, William T. Hayden made homestead entry, No. 2758, of the NE. ¼ of Sec. 28, T. 20, R. 4 E., Perry land district, Oklahoma Territory.

April 23, 1894, Lorenzo Irwin filed his affidavit of contest, alleging prior settlement, and January 5, 1895, filed an amended affidavit of contest, charging that Hayden had never established his residence on said tract and has wholly abandoned said tract for more than six months since making said entry and next prior to the date herein; that said tract is not settled upon and cultivated as required by law. Notice was served on Hayden, and a hearing was set for December 17, 1895, at which time both parties appeared, but the case was continued until February 17, 1896, and the hearing held, both parties being present. Hayden, by his attorney, moved to strike out the allegation of prior settlement, for the reason that the affidavit of contest was not filed within three months from the date of the entry of the contestee, which motion was sustained, and the trial proceeded with on the charges laid in the amended affidavit of contest. March 9, 1896, the local officers rendered their decision sustaining the contest and recommending that Hayden's entry be canceled. Hayden appealed, and your office affirmed the action of the register and receiver. Hayden now appeals to the Department.

The evidence taken in the case sustains the concurring decisions of your office and the local office, upon the facts.

The points chiefly relied on by the contestee are (1) that it was error in your office not to find that, when James Pogue withdrew his corroborating affidavit, the local officers lost all jurisdiction in this cause, and further erred in not dismissing the contest against this defendant, when it stood before the local office uncorroborated; (2) that your office erred in not finding that the defendant was driven from the land by threats and acts of violence by the plaintiff in this case and that he could not have maintained a residence upon the land during the time covered by this contest affidavit without danger of great bodily harm and loss of life.

On the first point, it appears from the record that, November 15, 1895, Hayden filed in the local office Pogue's withdrawal of his affidavit corroborating Irwin's affidavit of contest, together with a motion to dismiss the contest, and for a rule on the contestant to furnish additional corroboration; that the local officers overruled the motion to dismiss the contest and allowed the contestant ten days within which to file a new corroborating affidavit; that November 21, 1895, the contestant filed the required affidavit.

It was not error in the local officers to refuse to dismiss the contest and to allow the contestant to file a new corroborating affidavit. Corroborative proof, while provided for by the rules of practice, may be dispensed with, and the purpose of the rule requiring that an affidavit of contest shall be accompanied by the affidavits of one or more witnesses in support of its allegations, is to assure the government of the good faith of the contestant, and not that jurisdiction may be vested in the local officers—that being obtained only by service of notice. Shugren *et al. v.* Dillman, 19 L. D., 453.

On the other point, the testimony shows that about May 1, 1895, one J. P. Stout went upon the claim, at the instance of the contestee, to do some breaking, and swore that he was driven off by the contestant; that there was a great deal of trouble between the parties, and many suits at law and arrests, occasioned by the alleged tearing down of the contestee's tent, and the subsequent burning of the contestant's house; that about the latter part of May or the first of June, 1895, a party of men went upon the land with horses and plows and attempted to plow, whereupon a difficulty arose between them, which ended in "a free fight;" that in January, 1894, one J. E. Davis called upon the contestant to see if he would not sell his interest in the land in controversy, and that the contestant, at that time, threatened to kill the contestee; that the contestee was not present during this conversation, but it appears that in June or July, 1894, Davis informed him of his conversation with the contestant, and the contestee says that it is this threat that kept him from residing upon and cultivating his claim until June, 1895. But the contestee admits that after he had been told of contestant's threat, he

was several times at the contestant's house on the land, and that he ate with him and slept in his house.

Your office refused to accept the plea of intimidation, holding that the subsequent conduct of Hayden shows that he was not intimidated to the extent of being afraid of bodily injury at the hands of Irwin, and this opinion is concurred in. See Foote *v.* McMillan, 22 L. D., 280, where it was held (syllabus):

Non-compliance with the law will not be excused on the ground of intimidation where it is apparent from the conduct of the party that the alleged threats did not lead him to believe that he was in danger of bodily injury.

The decision of your office is accordingly affirmed.

CONTEST—INSUFFICIENCY OF CHARGE—SECOND ENTRY.

SWEET *v.* BEHAR.

A charge that a second entry under section 13, act of March 2, 1889, was allowed on a showing insufficient under the departmental regulations does not warrant a hearing, in the absence of affirmative allegations as to the entryman's actual disqualification under the statute.

Secretary Bliss to the Commissioner of the General Land Office, October 25, 1898.

(F. L. C.) (C. J. G.)

The land involved in this controversy is the N½ of the NW¼ of Sec. 23, T. 26 N., R. 1 W., Perry land district, Oklahoma.

The record shows that on September 25, 1893, Charles P. Sweet made homestead entry No. 751 for the NW¼ of said Sec. 23. November 7, following, John Behar filed affidavit of contest against said entry, alleging prior settlement. A hearing was had and upon the testimony submitted the local office recommended the cancellation of Sweet's entry.

April 27, 1895, your office, on appeal, modified the decision of the local office to the extent of holding the entry for cancellation as to the N½ of the NW¼ of Sec. 23, and allowing Behar to make entry therefor. Upon further appeal the Department on June 9, 1896, affirmed the action of your office, and February 13, 1897, denied a motion for review. See case of Behar *v.* Sweet, 24 L. D. 158.

February 24, 1897, your office closed the case, the local office being instructed to allow Behar thirty days in which to enter the N½ of the NW¼ of Sec. 23.

March 8, 1897, the entry was canceled as to the said N½ of the NW¼ of Sec. 23, and Behar made homestead entry No. 9022 therefor. In his application to enter Behar alleged

that I have not heretofore made any entry under the homestead laws, except that I made homestead entry for one hundred and sixty at Valentine Nebraska Land office about fifteen years since and made commutation proof for same.

March 22, 1897, Sweet filed a petition for reconsideration of the case of Behar *v.* Sweet, *supra.*

September 2, 1897, case unreported, the Department denied said petition, concluding as follows:

The question as to whether Behar has complied with the circular of instructions referred to by counsel, relative to the right to make a second entry of these lands, is not a proper subject of inquiry upon this petition. The entry having been allowed, matters affecting its validity can be determined only when presented in a case properly putting the validity of the entry in issue.

September 10, 1897, Sweet filed affidavit of contest against Behar's entry, alleging:

That the said entry, as affiant is advised and believes, is illegal for the reason that in an affidavit filed with said entry, said Behar admits having made a former homestead entry at Valentine, Nebr., but wholly fails to make affidavit to the facts necessary to entitle him to make a second entry under the act of March 2, 1889, by giving the number of said original entry, its date or a description of the land covered thereby, as required by law.

The local office rejected this affidavit—

because all matters between these parties, to wit, Sweet and Behar was determined on a question of prior settlement which was finally ended by Commissioner's letter H of February 24, 1897, by which Behar was allowed to make homestead entry and because in view of the former contest case between those parties on a question of prior settlement no cause of action is set forth in said contest affidavit.

Thereupon Sweet filed an appeal to your office, specifying the following errors:

(1) In holding that the charges made in appellant's contest affidavit have been adjudicated

(2) In holding that the question of Behar's qualifications in the matter of prior entry was adjudicated in a proceeding involving prior settlement.

(3) In holding that the contest affidavit alleges no cause of action.

(4) Because the Secretary's decision of September 2, 1897, overruling the petition for re-review, expressly remands the question of the illegality of Behar's entry for separate action.

August 24, 1898, your office rendered decision concluding as follows:

I do not understand that in his decision of September 2, 1897, the Honorable Secretary "expressly remands the question of illegality of Behar's entry, for separate proceedings," nor that he in any manner expressed an opinion as to the sufficiency of the charge, only that "matters affecting its (the entry's) validity can be determined only when presented in a case properly putting the validity of the entry in issue."

In the case of Samuel Wright *v.* Caleb Goode, Doc. A, Case 465, the entryman alleged that he had never before made a homestead entry except "H. E. 160 acres in Brown Co., Neb., at O'Neal, Neb., and commuted the same." It was alleged that the entry was allowed on an insufficient showing of the entryman's qualification, in this, that his application to enter shows that he had heretofore made and commuted a homestead entry, without in anywise specifying the date of entry or commutation, or furnishing any data from which the entry can be identified on the records of this Department. By letter "H" of July 1, 1898, it was held that "it is a defect which can and should be cured," and that "the charge is not sufficient to warrant a hearing thereon."

In accordance with the decision above cited, and which I still believe to be correct, your decision is affirmed, and the affidavit of contest rejected.

Notify Sweet hereof and of his right to appeal.

Should this decision become final, you will require Behar to furnish an affidavit, "designating in the affidavit his former entry by description of the land, number and date of entry, with the land office where made," so that the same may be identified by the records of this office. See page 48, General Land Office circular of October 30, 1895.

Sweet has appealed to the Department, the following errors being assigned:

1. In affirming the decision of the register and receiver.
2. In holding that the charge in the contest affidavit is not sufficient to warrant a hearing.
3. In holding that the Secretary did not express any opinion as to the invalidity of the entry.
4. In finding that the defect in Behar's entry is one that can be cured, there being nothing in the record to show that it could be cured.
5. In finding that because said defect "can and should be cured," it is not a ground of contest.
6. In not finding that such admitted defect cannot be cured after it has been made the ground of a contest.
7. In directing that Behar be required and allowed to furnish an affidavit to complete his entry, in the face of a contest affidavit showing its invalidity.
8. In not ordering a hearing.

Contest in this case was originally brought, the hearing had, and decision rendered, upon the ground of prior settlement. The question of Behar's disqualification to make second entry was raised for the first time in a petition for re-review filed befort the Department June 4, 1897. Behar was questioned at the hearing touching his qualifications in this respect, and gave substantially the same testimony as contained in his homestead affidavit. He stated that he commuted his original entry prior to March 2, 1889.

One of the provisions of section 13 of the act of March 2, 1889 (25 Stat., 1005), under which Behar's entry was made, is as follows:

And provided further, That any person who having attempted to, but for any cause failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands.

The portion of the instructions, issued April 1, 1889 (8 L. D., 336), having reference to the above proviso, is as follows:

A person desiring to make another entry under this provision will be required to make affidavit to the facts necessary to entitle him to do so under the laws and rules, designating in the affidavit his former entry by description of the land, number and date of entry, with the name of the land office where made, or other sufficient data to admit of readily identifying it on the official records, which affidavit you will transmit with the other entry papers to this office.

It is Behar's omission and failure to comply with the letter of these instructions against which Sweet's contest is directed, and on account of which omission and failure the cancellation of Behar's second entry

is requested. It will be observed that the act of March 2, 1889, does not in terms impose disqualification for such an omission or failure, nor does the contest affidavit allege that Behar is disqualified to make the entry in question by reason of his former entry in Nebraska. It is not affirmatively shown that Behar did not commute his former entry as alleged, or that he is otherwise disqualified under the act of March 2, 1889; only that the affidavit filed by him is not sufficient to entitle him to make entry under said act. It is thus in effect asked that he be declared disqualified and his second entry canceled because of an omission to strictly comply with a departmental regulation, and not because of any violation of a statutory requirement. It is apparent that this is not sufficient ground either for the cancellation of Behar's entry or upon which to base an order for a hearing. The defect in the affidavit is one that may properly be cured by him. As was said in the case of Walk *v.* Beaty, 26 L. D., 54, involving a failure to file a "non-sooner" affidavit with a soldier's declaratory statement:

> It is also clear that it was the duty of the local officers to reject the filing for want of the affidavit required. But inasmuch as the application was not rejected, but allowed and placed of record by these officers, it is thought that no good reason exists why the defect may not be supplied, even in the presence of an adverse claim. This affidavit was not a statutory requirement, but a regulation of the Department. The statute does not disqualify a man because he has failed to make oath to his qualifications.
>
> The requirement, *supra*, of the regulations was a precautionary measure adopted by the Department under general administrative authority and for the guidance of the local officers in administering the law, and did not, in itself, impose a disqualification.

As between Behar and the government notice will be taken of the defect in his entry papers, and in the event of his failure after due notice to furnish the required information as to his original entry, his second entry in question will be canceled.

Your office decision rejecting Sweet's affidavit of contest is hereby affirmed.

TOWNSITE ENTRIES IN ALASKA.

ORDER AMENDING PARAGRAPH 24, REGULATIONS OF JUNE 3, 1891.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 27, 1898.

It is hereby ordered that paragraph 24 of the Regulations relative to townsites in Alaska, approved June 3, 1891 (12 L. D., 583), as amended February 17, 1896 (22 L. D., 119), be and the same hereby is amended, so that said paragraph shall read as follows:

24. The fee simple title to certain real estate in Alaska was conferred under Russian rule upon certain individuals and the Greek Oriental Church, and confirmed by treaty concluded March 30, 1867, between

the United States and the Emperor of Russia (15 Stat. at Large, 539); the act of March 3, 1891 (26 Stat., 1095), in section 14, has expressly excepted from entry for townsites and trading and manufacturing sites all tracts of land in Alaska, not exceeding six hundred and forty acres in any one tract, occupied as missionary stations at the date of the passage of same; while other real property is now held and occupied by the United States in several of the Alaska towns for school and other public purposes, and it is perhaps desirable that still other lots or blocks in those towns that take advantage of the provisions of said act should be reserved to meet the future requirements for school purposes or as sites for Government buildings. Therefore, such employee or employees of the Government as shall be designated or detailed for that purpose shall constitute a board whose duty it shall be, as soon as notified by the United States surveyor-general of Alaska that the duplicate receipt for the money deposited to defray the costs of a special survey of the exterior lines of such townsites has been received by him, to go upon the land applied for and to determine and designate what lands should be eliminated from the townsite survey, as above indicated.

Such board shall inquire into the title to the several private claims and church claims held in such townsite under Russian conveyances, as originally granted and claimed at the date of the acquisition of Alaska by this Government, and into the claims for land therein, not exceeding six hundred and forty acres in one tract, occupied as missionary stations on March 3, 1891, and shall fix and determine the proper metes and bounds of said Church, missionary and private claims, after due notice having been given to the present owners of same both of their right to submit testimony and documents, either in person or by attorney, in support of same, and of their right, within thirty days from receipt of notice of the conclusions of said board, to file an appeal therefrom with said board, for transmission to this office. Should any one of such parties be dissatisfied with the decision of this office in such a case, he may still further prosecute an appeal to the Secretary of the Interior upon such terms as shall be prescribed in each individual case. Proper evidence of notice should be taken by said board in all cases, and a record of all testimony submitted to them should be kept. If an appeal is taken, the same, together with the decision of the board and all papers and evidence affecting the claims of the appellant, should be forwarded direct to this office. Should no appeal be taken, the report of the board should be filed with the United States surveyor general for his use and guidance as hereinafter directed.

It shall also be the official duty of said board to approximately fix and determine the metes and bounds of all lots and blocks in any such townsite now occupied by the Government for school or other public purposes, and of all unclaimed lots or blocks which, in their judgment, should be reserved for school or any other purpose, and to make report of such investigations to the surveyor general for his use and guidance, as also hereinafter directed, should no appeal be filed therefrom.

Should an appeal from the action or decision of such board be filed in any case, no further action will be taken by the surveyor-general until the matter has been finally decided by this office or the Department. But should no appeal be filed, the surveyor-general will proceed to direct the survey of the outboundaries of the townsite to be made, the same in all respects as above directed in the survey of land for trade and manufacturing purposes, except that he will accept the report and recommendations made by said board and exclude and

except, by metes and bounds, from the land so surveyed, all the lots and blocks for any purpose recommended to be excepted by said board. The execution of the survey of the lots and blocks thus excepted, shall be made a part of the duties of the surveyor who is deputized to survey the exterior lines of the townsite; the survey of such lots or blocks shall be connected by course and distance with a corner of the townsite survey, and also fully described in the field notes of said survey and protracted upon the plat of said townsite; and the limits of such lots or blocks will be permanently marked upon the ground in such manner as the surveyor general shall direct. In forwarding the plat and field notes of the survey of any townsite for the approval of this office, the surveyor general will also forward any reports that said board may have filed with him for approval in like manner.

BINGER HERMANN, *Commissioner.*

Approved:

C. N. BLISS, *Secretary.*

SETTLEMENT RIGHT—ACT OF MAY 14, 1880—RESIDENCE.

GARDNER *v.* CLAYPOOL.

A homestead settler who files application to enter within the statutory period after settlement, but fails to secure an entry on account of a prior adverse record claim, is not in default in the matter of protecting his settlement right, where, as soon as practicable, he attacks said claim, alleging his own priority of settlement, though such contest may not be instituted until after the expiration of said period.

A contest against an entry on the ground of priority of settlement must fail if it is not shown that the settler established and maintained a *bona fide* residence.

Secretary Bliss to the Commissioner of the General Land Office, October (F. L. C.) *27, 1898.* (W. A. E.)

December 9, 1893, Gilbert O. Claypool made homestead entry for the NW. ¼ of Sec. 29, T. 28 N., R. 6 W., Enid, Oklahoma, land district.

December 14, 1893, William M. Gardner filed homestead application for the same land. This application (which contained no allegation of settlement) was rejected under date of December 15, 1893, on account of the conflict with Claypool's entry.

December 18, 1893, Gardner filed affidavit of contest, alleging settlement September 16, 1893, prior to the date of the defendant's entry and prior to any settlement made on said land by any other person.

On the day appointed for hearing, March 18, 1895, the defendant appeared specially for the purpose of moving a dismissal of the contest on the ground that it was not filed within three months from the date of the alleged settlement. This motion was overruled, the defendant entered a general appearance, and the case proceeded to trial.

February 10, 1896, the register and receiver rendered their opinion holding that while the contestant was the first settler on the land in controversy, he had not followed up his settlement by the establishment of residence in good faith, and that therefore the defendant's entry should be held intact.

On appeal, your office held that the motion to dismiss the contest should have been sustained, as the contestant had failed to make any allegation of prior settlement, either in his homestead application or by way of contest, until after the expiration of three months from the date of his alleged settlement.

The contestant's further appeal brings the case before the Department.

It appears that for three months following the opening of the Cherokee Strip there was a continuous line of people endeavoring to get into the land office at Enid to file their homestead applications, and that the local officers, realizing that many settlers would not be able to make entry in person within three months from the date of their settlement, issued an order providing that all applicants would be given an opportunity to file their applications on December 14, 1893, and that these applications would be numbered in the order in which they were presented and considered as soon as possible. Gardner's application was filed under this order and was rejected the following day, December 15, for conflict with Claypool's entry. Gardner testifies that at the time he filed his application he was not aware that there was an adverse claim to the land. As soon as possible after he received notice of the rejection of his application he filed contest affidavit against Claypool's entry.

Sec. 3 of the act of May 14, 1880 (21 Stat., 140), provides:

> That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he had settled under the pre-emption laws.

Gardner filed his application in the local land office within three months from the date of his settlement, and the only reason that it was not perfected into an entry was on account of the conflict with Claypool's entry—an entry of which he knew nothing until he was notified of the rejection of his application. As soon as possible thereafter he instituted a contest against Claypool's entry. It must accordingly be held that Gardner was not in default in the matter of protecting his settlement rights, and the case will be considered on its merits.

Claypool makes no allegation of prior settlement, but claims solely through his entry. In December, 1893, he built a good house on the land, into which he moved about the first of January, 1894. In June, 1894, he broke ten acres and planted the same to Kaffir corn. In October, 1894, he broke two acres more and put the entire twelve acres in wheat. At the time of the hearing in March, 1895, his improvements consisted of a house and about fourteen or fifteen acres of breaking, the greater part of which was under cultivation.

The plaintiff made the race on the day of opening and reached the

tract in question about 12:28 P. M. He dug a hole and set a stake and then spent the balance of the afternoon looking for corner-stones. Nothing further was done by him until about two weeks after the opening, when he built a small cabin. This cabin was about nine and a half feet long, three feet wide, five feet high on the lower side, and seven feet high on the higher side. It was built of rough boards and scraps of carpet and oilcloth and was partly across the north line of the tract. The north end was not closed in when some of the defendant's witnesses examined it in the late fall of 1893. In February, 1894, it was moved further south, so as to be entirely on the tract in question. About the latter part of October, 1893, he did some breaking, and in December, 1893, he started a cellar, which was never completed. In the summer of 1894 he did some additional plowing and built another house. This new house was about ten feet square and had two doors and one window. His testimony is very indefinite as to the amount of time he has actually spent upon the land. He testifies that he was upon the land about four days in September, 1893, about the same length of time in October, some two or three days in November, and as to the remaining months, up to the date of the hearing, he was unable to remember how many days in each month he was on the land. During the winter of 1893–4, he was teaming in Pond Creek Station. On page 23 of the record he was asked: "Do you mean to say that you have resided upon this tract of land to the exclusion of a residence elsewhere since the 16th day of Sept., 1893?" His reply was: "No sir, I have got a small place or house in Pond Creek." Immediately after this question and answer is a note by the stenographer as follows:

> Before counsel for deft. had an opportunity to ask witness another question, counsel for plaintiff asks the witness if he understood the question; to which the plaintiff answered—I didn't understand the question. That is the only home that I have got.

The defendant and the defendant's witnesses, with one exception, had never seen the plaintiff on the land in controversy. One witness had seen the plaintiff there a short time in August, 1894, when he built his second house.

It is evident that while the plaintiff was the prior settler upon the land, he failed to follow up his settlement by the establishment of a *bona fide* residence. In order to prevail against the defendant he must show not only prior settlement, but the establishment and maintenance of a residence in good faith. McInnes *et al. v.* Cotter, 21 L. D., 97; North Perry Townsite *et al. v.* Malone, 23 L. D., 87; Haskin *v.* Cuppage, 25 L. D., 334.

Your office decision is accordingly affirmed, and Gardner's contest will be dismissed.

SOLDIERS' ADDITIONAL HOMESTEAD-CERTIFICATE OF RIGHT.

EDWARD O'KEEFE.

The practice of certifying soldiers' additional homestead rights was discontinued by departmental order of February 13, 1883, except as to applications filed prior to March 16, 1883, and where an application so pending is subsequently denied by final departmental action, and the soldier exercises his right in person, a certificate of such right thereafter issued by the Commissioner of the General Land Office, and recertified for the benefit of an assignee, confers no right, not otherwise existing, on said assignee or those claiming under him.

The act of August 18, 1894, is limited in its operation to certificates of right issued prior to its passage, and to entries made with certificates so issued.

The claim of an alleged assignee of a soldiers' additional homestead right can not be recognized, where the soldier has in person exercised the right, if it is not clearly shown that the soldier, before making said entry, had in fact assigned his additional right, and that the government was charged with notice of such assignment prior to the allowance of said entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *October 20, 1898.* (E. B., Jr.)

The Department has considered your office communication of May 19, 1898, requesting instructions in the matter of the entry of Edward O'Keefe, for lot 4, Sec. 18, T. 35 N., R. 22 W., made at Wausau, Wisconsin, June 3, 1897, and now before your office for consideration.

It seems that Thomas O. George on May 10, 1875, made a soldiers' additional homestead entry at Susanville, California, under the provisions of section 2306 of the Revised Statutes, which was passed to patent, but this patent was canceled February 10, 1882, by decree of the circuit court of the United States for the district of California. (See 13 C. L. O., 167.)

April 21, 1882, application was filed in your office by Heylmun and Kane, on behalf of George, for the issuance of a certificate of his soldiers' additional homestead right under the circular of May 17, 1877 (4 C. L. O., 37). This application was denied, and upon appeal to the Department it was considered in the case of John M. Walker *et al.* (7 L. D., 565; on review, 10 L. D., 354), and for the reasons therein given the action of your office was affirmed.

December 10, 1888, George personally exercised his right to an additional homestead entry at the Duluth, Minnesota, local office, and this entry was carried to patent April 9, 1890. Looking at the terms of the decree canceling the first patent issued to George for land entered under his soldiers' additional right, it may be doubtful whether he was ever possessed of such a right, but for the purposes of the ruling here made it will be assumed, but not decided, that he was originally entitled to an additional homestead under section 2306.

By circular of February 13, 1883 (1 L. D., 651), the practice theretofore prevailing of certifying soldiers' rights to an additional homestead entry under the circular of May 17, 1877, *supra*, was discontinued, and

under the terms of the later circular your office could at no time since then make an original certification of such right except in a case where application was filed prior to March 16, 1883. As before stated, George had, April 21, 1882, filed an application for the certification of his additional right and this application came within the exception named in the later circular, but that application having been denied by the Department December 24, 1888, as aforesaid, and this action having been adhered to by the Department March 25, 1890, there was thereafter no application pending which your office could recognize as coming within the exception.

May 29, 1896, disregarding the circular of February 13, 1883, *supra*, and the decisions of the Department made December 24, 1888, and March 25, 1890, and further disregarding the fact that George had in the meantime personally exercised his right to an additional homestead entry and had received a patent for the lands entered, your predecessor, upon a petition filed by M. J. Wine, December 10, 1895, issued to Thomas O. George a certificate of such additional right, and upon the same day recertified such additional right to M. J. Wine, as assignee, so as to authorize the latter to make entry thereunder in his own name. This action of your predecessor amounts to nothing and does not confer upon Wine, or any one claiming under him, any right to which he was not otherwise entitled. If at the time of this certification to George and recertification to Wine, the latter was in fact entitled, as assignee, to exercise George's additional homestead right, then, upon the further assignment of that right by Wine to O'Keefe, the latter became entitled to make entry thereunder, not by reason of such certification and recertification but by reason of his ownership of the assignable right given George by section 2306; in other words, the exercise of this additional right by an assignee of George was not dependent upon such certification or recertification. If, upon the other hand, at the time of this certification and recertification, Wine was not entitled, as assignee of George, to exercise the additional homestead right of the latter, such certification and recertification would not entitle Wine, or any one claiming through him, to exercise that right. The case of Webster *v.* Luther (163 U. S., 331), which has been cited in this connection, is only an authority upon the right of the soldier to sell and assign his right to an additional homestead, and has no bearing upon the certification or recertification of such rights by your office.

The act of August 18, 1894 (28 Stat., 397), referred to in your office letter, is in exact words confined to certificates theretofore issued and to entries made with certificates theretofore issued. The certification to George and the recertification to Wine were subsequent to that act and, therefore, are not affected by it.

It remains to be considered whether before George made his additional homestead entry December 10, 1888, he had transferred and assigned his additional right to Wine so that thereafter Wine and not

George was entitled to make entry thereunder, and, if so, whether before George personally exercised that right at the Duluth, Minnesota, office, Wine informed the land department of such transfer and assignment, so as to charge the government with notice thereof. The first information given to the Department by Wine of the claimed purchase by him of George's additional right, was in an affidavit of Wine dated March 27, 1888, and filed April 7, 1888, in support of the application of George, made as aforesaid April 21, 1882, and then pending on appeal before the Department, wherein George sought to obtain a certification of his right to an additional homestead entry. This affidavit, which also relates to other like applications then pending, says:

> These claims (with the exception of those of George H. Stidhan and Edward Rush) were located at Susanville, California, in the year 1875, and were subsequently canceled.
>
> Having ascertained that the applications for these entries were genuinely made, and that the claimants had thereafter sold their interest in them I personally visited each of the applicants and represented the facts in regard to his prior application and sale of these rights, and of their location at Susanville, and their subsequent cancellation. I stated that although they had fully disposed of their rights, and thereby legally and morally divested themselves of all interest therein, they still had, according to the statutes and the rulings of the Department, the right to make new applications and to locate them, either in person or by attorney, but that their moral and legal right to become re-invested with full title to these claims could be acquired only by obtaining a rescission of their former sale.
>
> I surrendered to the applicant the powers of attorney which he had previously given to make this location, as *prima facie* evidence of my authority to act for the persons in whose interest such locations had been made.
>
> Having done this, I stated that no bargain for the sale or transfer of these rights could be made until after he had made application for entry under the regulations then in force. Applications, duly prepared and executed were then delivered to me to file as his attorney for certification and location, and by my directions were filed in the General Land Office.
>
> Subsequently I bargained with each of these applicants for his right to make these locations. I paid them a certain amount in cash at the time, and agreed to pay them a larger sum when their rights to make such entries should have been ascertained and declared to be valid.

The statements in this affidavit tend to show an unexecuted and unfulfilled agreement by George to transfer and assign his additional homestead right to Wine upon certain conditions then unperformed, but they fall far short of showing that the transfer and assignment was an accomplished fact such as took from George and vested in Wine the right to make the additional entry. Such an agreement is not the equivalent of a transfer and assignment. The land department could not know whether Wine would comply with the conditions named or whether George would perform his part of the agreement. Whatever might have been Wine's remedy for a breach of the agreement by George, it is certain that the land department would have been powerless to compel specific performance thereof. This affidavit was not sufficient to give notice of a transfer and assignment of George's right, although, as then held by the Department, it did tend to show that

George's application for certification was being prosecuted in the interest of the intended assignee.

In an affidavit filed in your office February 5, 1896, referring to the alleged agreement for the transfer and assignment to him of the additional homestead rights named in his former affidavit, Wine says:

> That subsequently the amount remaining to be paid was agreed upon between deponent and each of the said claimants and paid in full to each one by deponent in cash, except said Edward Rush.

This affidavit, however, is of no moment, because it was filed over seven years after George had himself exercised his right to make such additional entry, nor does it assert that the claimed purchase was so completed before George exhausted his right by the entry at Duluth, Minnesota.

In his application filed December 10, 1895, as aforesaid, Wine, referring to the original applications by George and others for certification in their own respective names, says:

> That these applications were, each and all, delivered to M. J. Wine, an attorney practicing in the Department at the time, and then and now a resident of Washington, D. C., and the assignee named herein. That on account of temporary absence from the city he caused the same to be duly filed in the land office during the year 1882 by Heylmun and Kane, a firm of attorneys then practicing before the Department . . . . That following the delivery of the said application to the said attorney, Wine, the said applicants assigned respectively all of the same to the said Wine for an adequate and valuable consideration, the assignments of which are shown by powers of attorney to said Wine on file in your office with the papers in said cases.

No power of attorney is referred to in your office letter, and none is found among the papers submitted, but among the files of the case are found a power of attorney executed by George, October 20, 1886, authorizing P. H. Seymour, of Washington, to prosecute his claim for an additional homestead, and an affidavit of the same date wherein George deposes as follows:

> That sometime in or about the year 1876 I located by agent a tract of 40 acres at Susanville, Cala., as an additional homestead to my said original. That a patent issued for said additional entry, that in the year 1882 by a decree of the U. S. circuit court said patent was set aside and annulled. That before the action of said court was known to me, I was called upon at my house by a man who gave his name as Wine of Washington, D. C., who stated to me that owing to an error in papers executed by me, for the exercise of my additional right, it became necessary that other papers be executed. Believing the statement thus made to be true I signed such papers as the said Wine prepared, for the sole purpose of correcting, as I was informed and believed, an error in the former papers. That I am now aware that those papers thus secured were not for the purpose of correcting any error in former papers but were for the purpose of securing for other parties my right to forty acres of additional homestead to which I was entitled upon the cancellation of my former additional entry.
>
> And further, that I am informed and believe that these papers thus fraudulently secured are now in the hands of one Heylmun of Washington, D. C., who by virtue of them is appearing as my attorney, and urging my claim for certification, and to secure to himself my certificate when issued in my name.
>
> As the authority under which the said Heylmun is acting if in fact he has any was

obtained from me by misrepresentations and false statements, I hereby revoke any and all powers of attorney heretofore made in relation to my said additional right, except the ones made this day, and request that if a certificate for my said right be issued, that the same be sent to the Bank of Marshfield, Marshfield, Webster Co., Mo., and I further request that if no certificate be issued that I be permitted to make my additional entry in person.

The statements made in this affidavit find some corroboration in the fact that George did, December 10, 1888, personally exercise his right to make an additional homestead entry. Without further comment it is held that there is no showing that the government was charged with notice that any one held a subsisting transfer and assignment of George's right to an additional homestead entry at the time when he personally exercised that right at Duluth, Minnesota.

It is believed that this constitutes a sufficient answer to your said office communication of May 19, 1898. The papers are herewith returned.

RAILROAD LANDS—SETTLEMENT RIGHTS—FORCIBLE INTRUSION.

SHEPARD ET AL. *v.* MEYER ET AL.

On the opening of railroad lands forfeited by the act of March 2, 1889, existing settlement rights take precedence over applications to enter filed at the hour of opening; and as between settlers on said lands priority of settlement may be considered.

A settlement made by going upon public land and taking possession of an apparently abandoned dwelling house and establishing residence therein, is not within the rule as to forcible intrusion laid down in Atherton *v.* Fowler, where the owner of such dwelling makes no objection as to such occupancy, and the settler subsequently purchases said building of him.

Secretary Bliss to the Commissioner of the General Land Office, October (F. L. C.) *27, 1898.* (G. B. G.)

This case involves the SE. ¼ of Sec. 17, T. 50 N., R. 38 W., Marquette, Michigan.

January 10, 1895, Fred W. Meyer made homestead application for the S. ½ of the S. ½ of said section 17, and on the same day, at ten minutes past ten o'clock, John Coughlin made homestead application for the N. ½ of the S. ½ of the same section. On the same day Alex Gagnon made homestead application for the SE. ¼ of said section, alleging settlement and residence from November 6, 1894.

George W. McElveen made homestead application by mail for the said SE. ¼, which was received at the local office January 11, 1895.

January 14, 1895, Timothy A. Griffin made homestead application for the said SE. ¼, claiming settlement from January 10, 1895.

January 17, 1895, Garrett Shepard made homestead application for the said SE. ¼, claiming settlement since January 9, 1895.

The local officers ordered a hearing, which was had March 15, 1895, but it appears from the statement of those officers that Shepard refused

to pay for extending the testimony in his behalf; whereupon, they ordered a new hearing, which was had March 12, 1896, when all parties appeared, except Alex Gagnon, who filed a waiver of all his rights to said land.

May 12, 1896, the local officers rendered a decision in favor of Griffin, from which Coughlin, Meyer, and Shepard appealed.

February 8, 1897, your office reversed the action of the local officers and awarded the land to Shepard, subject to right of appeal by Meyer, Coughlin, and Griffin. Griffin has appealed to the Department.

The land in dispute is within the conflicting limits of the Ontonagon and Brule River Railroad and the Marquette, Houghton and Ontonagon Railroad grants, was forfeited to the United States by the act of March 2, 1889 (25 Stat., 1008), and was opened to entry at ten o'clock A. M., January 10, 1895, pursuant to departmental decision of October 31, 1891, in the case of the Ontonagon and Brule River R. R. Co. (13 L. D., 463).

Inasmuch as the appeal of Griffin puts in issue the rights of all the parties to the case, whether they appealed from your office decision or not, a preliminary question of law arises as to the comparative rights of the parties who claim under their respective applications to enter, filed after ten o'clock A. M. of the opening day, and those who rely upon settlement made before that time. To decide this question it is not necessary to inquire whether this land was open to settlement prior to ten o'clock A. M., January 10, 1895. It is certain that it was open to settlement as well as entry at that time. This being so, inasmuch as there is no prohibition, either in the forfeiture act or in the order opening the land to entry, against entering upon or occupying the land prior to the opening, it is equally certain that no disqualification resulted from a settlement thereon prior to the hour of opening, and whether these settlers acquired any rights as against each other or not, their settlement rights attached at ten o'clock A. M., January 10, 1895. It appearing that both Griffin and Shepard were settlers upon the land in controversy at that time, it results that Meyer and Coughlin took nothing by their applications to enter made after that time, neither of these applications being based on an allegation of prior settlement.

Gagnon has filed a waiver of his rights to said land, and McElveen did not appeal from the decision of the local officers, who found as to him that his settlement was not made in good faith, and that he had never resided upon the land. Your office properly held that this finding of facts as to McElveen was, in the absence of appeal, final. Moreover, the record shows it to be correct. This eliminates all the parties to the case, except Shepard and Griffin.

The evidence shows that Shepard went upon the land on the 9th of January, about ten o'clock in the forenoon, made a shovel out of a board and cleaned the snow out of an old abandoned house which he found there, and dipped the water out of a small cellar under the

house. He had taken provisions with him, and he ate his dinner and supper there that day. He then went back to the town of Rubicon "for the purpose of getting witnesses to go upon the land," and returned to the land with his two witnesses that night, "about five minutes to twelve," by three watches, and moved his family into the house about half past eleven o'clock the next day, January 10, 1895. The family consisted of his wife and three children, aged nine, seven, and five years old respectively. He then repaired the house, cleaned some land, and lived there with his family until September 20, 1895, when he went to Rubicon to put his children to school, leaving on the claim a cook stove, dishes, bedsteads, springs, quilts, blankets, chairs, table, and other small household articles. He continued to do work on the land during September, October, and November, digging potatoes and clearing land. At the date of the hearing, March 12, 1896, he was living with his family at Withey, Ontonagon county, Michigan, where he was at work. Shepard himself states that he has to work to support his family, and that he could not keep them on the claim during the winter while he was working away from home; that his household goods were then on the claim, and had been for three weeks; that he had potatoes buried there, and everything in readiness "to live there again," and that it was and had been his purpose from the time he entered upon the land to the date of the hearing to remain on the claim and make a homestead out of it.

On behalf of Griffin, it is shown that he arrived on the land about 11:15 o'clock P. M., January 9, 1895, and that at 12 o'clock or one minute thereafter he and the men with him cut some trees, blazed them, and laid four logs as the foundation for a house. This work was done in less than one hour, and he then went three or four miles away and slept, getting back to the claim about ten or eleven o'clock the next morning, working there continuously from the 10th to the 14th of January, until he got his house completed, he then going to the land office to file. He cleared an acre of ground, and his family moved into the house on January 29, 1895, with household goods and provisions enough to last three or four months. He made some out door improvements, including a well, and put out a considerable garden in the spring. His wife went away from the claim about the 18th of June, 1895. He went away about the same time to get work as a support, and went back twice afterwards between that time and November, remaining two or three days. From November 12, 1895, to date of hearing, he had not been on the claim. Griffin states that he could not make a living on the claim, that his wife's health was such that she could not live there without him, that he had no intention of abandoning his improvements, and that he intended to make it his home.

Shepard was the first settler on the land. Whether he took anything as against the government by virtue of his settlement before twelve o'clock P. M. of January 9, 1895, or before ten o'clock A. M. of January

10, need not be discussed. However this may be, the rule is that such initiatory acts of settlement may be considered as between adverse claimants in determining equitable priorities in the absence of any disqualification imposed by law on account of such acts. This being so, Shepard has the better right to the land, other things being equal.

The improvements made by Shepard and Griffin upon the land are very nearly equal, and their financial condition considered, support the conclusion that they were both acting in good faith. It is insisted in this behalf that Shepard did not build the house in which he lived upon the land, that it was the property of another, and that he took forcible possession of it. The record shows that there was no such forcible intrusion as to bring the case within the rule laid down in the case of Atherton *v.* Fowler (96 U. S., 513). The house was not occupied and bore every evidence of abandonment. Besides, it appears that it was the property of Alex Gagnon, and he has entered no complaint against Shepard on account of his occupation of it, and Shepard subsequently purchased it from Gagnon.

Shepard's residence upon the land in controversy, it is believed, under the circumstances, meets the requirements of the law.

The decision appealed from is affirmed.

HOMESTEAD—CANCELLATION—WIDOW—HEIRS.

BOYLE *v.* WOLF.

Where a homesteader dies prior to the submission of final proof his entry should not be canceled for failure to submit said proof without notice to the widow; and if so canceled, the intervening entry of another, made with actual notice of the widow's claim, will not defeat her right to be heard.

On the death of a homesteader, who has earned title to the land, the right to submit final proof and obtain patent is in the widow and not in the heirs.

Secretary Bliss to the Commissioner of the General Land Office, October 28, 1898.

(F. L. C.) (C. J. W.)

On June 4, 1887, James B. Boyle made homestead entry for the E. ½ of the NE. ¼, the SW. ¼ of the NE. ¼ and the NW. ¼ of the SE. ¼, Sec. 29, T. 10 S., R. 6 W., Huntsville land district, Alabama.

On August 14, 1895, the entry was canceled because of failure to offer final proof.

On August 16, 1895, Simon J. Wolf made homestead entry for the same land.

On December 2, 1895, Manda M. Boyle, widow of James B. Boyle, the deceased entryman, filed an affidavit, in which she set forth that she and her deceased husband had fully complied with the requirements of the homestead law as to residence, improvement and cultivation of the land for more than five years, and were not in default except in the offering of final proof, which her husband failed to do

because of his want of means, caused by the sickness which terminated his life; that her husband when he died left her and two small children penniless and helpless, and that they were driven from their home by the cruelty of the grown children of her deceased husband by a former marriage; that she had not been notified of the cancellation of her deceased husband's entry, and that said entry had been wrongfully canceled, and she claimed the right to perfect the original entry by the submission of final proof, and prayed for a hearing, to the end that Wolf's entry might be canceled and the entry of her deceased husband reinstated.

Such hearing was thereafter had, which resulted in a decision by the local officers holding Wolf's entry intact and recommending the dismissal of Mrs. Boyle's contest. She appealed, and on January 30, 1897, your office reversed the local office.

The case is before the Department on the appeal of Simon J. Wolf from your office decision.

It is not pretended that the original entryman, James J. Boyle, was in default in any respect, except that of failing to offer final proof after having otherwise complied with the law. It appears that he died in great poverty and distress, in August, 1893, after having fully complied with the law in the matter of residing upon, improving and cultivating the land, and was buried upon it. He left some grown children, the offspring of an early marriage, and the plaintiff (his widow) and two small children. The entry remained uncanceled until August 14, 1895, so there could be no notice to him that his entry was held for cancellation. The proof shows that such notice was never served upon his widow. She was entitled to such notice, and it follows that the cancellation of the original entry and the allowance of Wolf's entry were erroneous. The proof also shows that Wolf had actual notice of the claim and rights of Mrs. Boyle before he made entry, and in reference to her claim he does not have the status of an adverse claimant, with intervening rights, which will estop her from perfecting her claim. The proof shows that with her own labor she cleared land, split rails, made fence, worked on the buildings, plowed with an ox, and performed generally the labor of a man on the land, and just before her husband's death was beaten and driven away in destitution by a stepson, who was about grown, and a stepdaughter. She went to her mother for temporary shelter for herself and her small children. This was no abandonment of her rights. An attempt is made to show that she offered to sell her interest in the land after her husband's death, but it is not contended that she did sell or enter into any contract to do so. A mere offer to sell, if she made such offer, would not affect her rights in any respect.

It appears that before Wolf made entry he did purchase what is termed the interest of the entryman's first children in the improvements on the land, and that he made an offer to purchase from the widow, which was not accepted.

These facts indicate that the rights of this widow, under section 2291 of the Revised Statutes, were either misunderstood or wrongfully disputed. Under said section, upon the death of her husband, who had already earned title to the land, it was her right to make final proof and obtain patent, and no such right was in the heirs. *Ex parte* Thaddeus M. Armstrong (18 L. D., 421).

Wolf obtained no right by virtue of his purchase of improvements from one claiming under the heirs of James B. Boyle.

Your office decision is affirmed.

You are directed to cancel the entry of Simon J. Wolf for the land in controversy, which was erroneously allowed, and to reinstate the entry of James B. Boyle, and Manda M. Boyle, his widow, will be allowed to make final proof.

GOVERNMENT SURVEYS.

PENALTY FOR DESTRUCTION OF MARKS OF SURVEY.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 29, 1898.

The attention of the public is called to that portion of the act of Congress, approved June 10, 1896 (29 Stat., 343), providing penalties for the destruction of marks of public surveys, which reads as follows:

> That hereafter it shall be unlawful for any person to destroy, deface, change, or remove to another place any section corner, quarter-section corner, or meander post, on any government line of survey, or to cut down any witness tree or any tree blazed to mark the line of a government survey, or to deface, change, or remove any monument or bench mark of any government survey. That any person who shall offend against any of the provisions of this paragraph shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court shall be fined not exceeding two hundred and fifty dollars, or be imprisoned not more than one hundred days. All the fines accruing under this paragraph shall be paid into the Treasury, and the informer in each case of conviction shall be paid the sum of twenty-five dollars.

It is the purpose of this office to prosecute all persons violating said act, and with this end in view, special agents and forest officers are directed to investigate and report all cases of its violation coming to their notice.

They will also call the attention of the public to the penalties prescribed by said act and to the fact that informers are allowed twenty-five dollars in each case reported, where conviction is secured.

BINGER HERMANN,
Commissioner.

Approved,
C. N. BLISS, *Secretary.*

TACOMA LAND CO. *v.* NORTHERN PACIFIC R. R. CO. ET AL.

Motion for review of departmental decision of April 12, 1898, 26 L. D., 503, denied by Secretary Bliss, October 31, 1898.

SETTLEMENT RIGHTS—ABANDONMENT.

JONES *v.* PUTNAM.

An agreement between two settlers on the same quarter section, who have in effect recognized a partition of the land as between themselves, that the abandonment of either shall inure to the benefit of the other, can not operate to defeat the right of an intervening settler, in the event of such abandonment.

Secretary Bliss to the Commissioner of the General Land Office, October
(F. L. C.) *31, 1898.* (L. L. B.)

On the 16th day of September, 1893, Daniel Jones and C. M. Neal made the race into the Cherokee Outlet and both settled upon the NW¼ of Sec. 26, T. 28 N., R. 3 E., Perry, Oklahoma. As it was difficult to determine which one first arrived on the land, neither having seen the other arrive, they agreed to divide the land rather than enter into a contest. With this understanding Neal settled upon the north half of the quarter section and Jones settled upon the south half. This quarter section is fractional, it being traversed by the Arkansas river a meandered stream. The north half is described as lot 2, and the NW¼ of the NW¼; the south half is described as lot 3 and the SW¼ of the NW¼. They were thus in possession on October 10, when Robert F. Putnam, the defendant herein, settled upon the north half of the quarter section. The next day Neal abandoned the said north half, and as he says turned over the possession thereof to Jones.

October 27, 1893, the local officers received by mail the application of Jones to make entry for the whole quarter section lying west of the river, it being the land so as aforesaid settled upon by him and Neal on the day of the opening. There is a small portion of this quarter section (8 acres) lying east of the Arkansas river, but for convenience in description the land in controversy has been and will be here described as the north half of the quarter and that part of it conceded to Jones as the south half thereof.

With his application he also enclosed a protest against allowing Putnam to make entry of the north half. November 7, 1893, Putnam made entry for the said north half, and November 22 the application of Jones to make entry for the whole quarter was rejected for conflict with the entry of Putnam and for want of special affidavit. November 23, 1893, Jones applied by mail to enter the south half, the part upon which his settlement was established in pursuance of his agreement with Neal. This application was also rejected. Jones did not appeal

from these rejections, but December 1st he filed contest against the entry of Putnam for the north half, alleging his settlement on the whole quarter section September 16, 1893. Twelve days later he again applied to enter the whole quarter section. This application was rejected for conflict with Putnam's entry of the north half.

This was the status of the land as revealed by the record at the date of the hearing, January 26, 1896.

The register and receiver found from the evidence that Jones agreed with Neal to take the south half of the quarter for his claim, but held that such an agreement was not such an abandonment of his claim to the north half as a third party could take advantage of on the withdrawal of Neal's claim, especially in view of the fact that Neal turned over his claim and possession to Jones. They sustained the contest.

November 30, 1896, your predecessor affirmed their action, finding that there was no agreement between Jones and Neal "as to what portion of said tract each was to have, and there being no division of the land agreed upon by them their rights were co-equal in the tract as a whole" and that when Neal abandoned the tract his rights inured to the benefit of Jones, but it was also held that "if plaintiff and said Neal had agreed upon and actually divided the land between them by establishing the lines and boundaries to the part each was to have" then the rights of Jones should be limited to the extent of his claim under the agreement.

Your said office decision was adhered to on motion for review, and the record is now here on the further appeal of Putnam.

After considerable research no case involving the question here presented is found in the departmental decisions, and it must be regarded as of first impression.

The evidence clearly sustains the finding of fact by the local office that there was an agreement or an understanding between Jones and Neal that the former was to take the south half and the latter the north half of the quarter section.

While they both say that there was no positive agreement as to how the land was to be divided they both admit that it "was talked over in that way." All Neal's improvements were on the north half and all of Jones' on the south half. Moreover, on the 23rd of November 1893, as before shown, Jones applied to make entry for the south half, and the whole record clearly shows that after his agreement with Neal he laid no claim to the north half until after the settlement of Putnam.

But it is insisted that he is entitled to the whole tract by reason of his settlement thereon on the day of the opening, and his claim to the whole quarter prior to his compromise with Neal; that such compromise and settlement was an abandonment of the north half only so far as the claim of Neal was concerned, and that as to the rest of the world his claim to the whole quarter was still asserted. As tending to support this contention, they both testify that it was agreed between them

that if either should abandon or relinquish his claim such abandonment should inure to the benefit of the other.

This means that each agreed to renounce any settlement claim to the other's portion until the other had abandoned it. There was then no settlement claim on the part of Jones to the north half until Neal relinquished his right, which was on the 11th of October, 1893. One day prior to that time, to wit: on the 10th of that month, Putnam settled on the part claimed by Neal. His settlement was therefore made at a time when Jones was not claiming the land. It will not do to say that he had renounced his settlement claim as to Neal but retained it as to Putnam and the rest of the world. Settlement is one of two ways of initiating a homestead claim; the other is by entry of record. If Neal had made entry of the north half of this quarter section it would not be contended that the relinquishment of his entry would inure to the benefit of Jones as against the claim of an actual settler at the date of the relinquishment. How then can such an agreement be enforced as between claimants by settlement. So long as a settlement right is asserted in good faith it reserves the land to the settler for a period of three months, but if the settlement is abandoned it is no longer asserted; and it is not material that such abandonment was in the interest of but one particular claimant, it would still be a relinquishment of the settler's claim, and subject the land to other appropriation.

The evidence shows that the settlement of Putnam was made in good faith. Neal had never established residence on the land and Putnam had no knowledge of the agreement between Jones and Neal until sometime after he had made his settlement and commenced his improvements. At the date of the hearing Putnam's improvements were estimated at from $200 to $400, while Jones had none on the land in dispute.

The contest of Jones is dismissed, and the entry of Putnam is held to show compliance with the homestead law.

Your office decision is accordingly reversed.

FINAL PROOF—EQUITABLE ADJUDICATION.

JAMES C. MORRIS.

The act of May 26, 1890, authorizing final proofs to be taken before commissioners of the United States circuit courts designates a new officer for such purpose, but does not change existing regulations as to the place of taking such proofs.

An entry may be referred to the board of equitable adjudication where it appears that the entryman has in good faith complied with the law, but through no fault of his executed his final proof before a commissioner outside of the county in which the land is situated.

Secretary Bliss to the Commissioner of the General Land Office, October 31, 1898.

(F. L. C.) (W. M. W.)

James C. Morris has appealed from your office decision of January 13, 1897, rejecting his final proof on his homestead entry for the W. ½

of the NW. ¼ of Sec. 20, and the E. ½ of the NE. ¼ of Sec. 19, T. 11 S., R. 10 W., Huntsville, Alabama, land district.

The record shows that Morris made homestead entry of the tract August 30, 1890. He gave notice of his intention to make final proof before a United States commissioner at Birmingham, Alabama, on October 31, 1896. At the time and place designated for making proof Morris appeared, before the officer named, and submitted his proof. On November 14, 1896, the register and receiver rejected his proof, "because proof not made on form prescribed by G. L. O." Morris appealed.

On January 13, 1897, your office found that:

> The proof was advertised to be taken and was taken before W. H. Hunter, commissioner of the U. S. circuit court at Birmingham, Alabama, October 31, 1896. Birmingham is in Jefferson county, Alabama, while the land embraced in the entry is in Winston county. In addition to the reason given by you, therefore, for rejecting the proof, the more serious objection exists that it was made before a U. S. commissioner outside the county in which the land is situated. For the reasons above set forth the final proof is rejected.

Morris appeals.

In his appeal to your office, Morris asserts that he has acted in good faith; that his proof was made on blanks furnished by the officer before whom he was ordered by the register and receiver to make it; that on the 14th of November, 1896, he received notice of its rejection; that he at once wrote to the local officers asking if he could not take the proof over on such blanks as they might send, and after writing twice to them on the subject, he received a letter in reply, dated November 27, 1896, in which the local officers informed him that "after the expiration of ten days from date set in published notice," he could not make the proof over again without republication. Morris's statements are in a measure borne out by blank forms of proof, and letters from the register and receiver, dated November 14, and 27, respectively. The blank forms upon which the proof was taken were evidently prepared for use in Dakota Territory, as appears from the jurat, and with this exception they are substantially the same as blanks now in use. The proof shows that Morris was qualified to make homestead entry; that he built a comfortable house and established an actual residence on the tract within the time required; that he cleared and fenced and cultivated some five or six acres of it; that with the exception of brief intervals he resided continuously upon it with his family; he is shown to be a very poor man and his absences were shown to be necessary in order to earn a living for himself and family while he was improving his homestead claim.

In view of the record and facts, the action of the register and receiver in rejecting Morris's proof upon the ground stated was clearly erroneous.

In passing upon Morris's final proof, your office seems to have entirely overlooked the rule announced in the case of Caroline Welo (8 L. D., 612), that the action of your office on final proof should cover the suf-

ficiency thereof, as well as other questions affecting the validity of the same.

It was the duty of the register to cause the notice of making final proof to be published and likewise his duty to see to it that the proper officer was designated before whom the proof was to be taken, and if the commissioner before whom the proof was taken was not competent to take the proof it was the fault of the register in designating him to take the proof and not the fault of the entryman. (Sylvester Gardner, 8 L. D., 463.) The proof having been rejected by the register and receiver upon an erroneous ground, the entry should have been treated by your office the same as if it had been allowed so far as the ground upon which it was rejected was concerned. In other words, your office should have corrected the erroneous decision of the local officers and then, as a matter of course, proceeded to pass upon all questions relating to the sufficiency and legality of the proof.

It appears from your office decision that the proof was taken before a United States circuit court commissioner, outside of the county in which the land is situated. The act of May 26, 1890 (26 Stat., 121), authorizes final proofs, under the homestead law, to be taken before any commissioner of the United States circuit court. In the case of Edward Bowker (11 L. D., 361), it was held that said act simply designated a new officer before whom such proofs might be taken, and not to change in any manner existing provisions defining the place for taking such proofs; and the circular of June 25, 1890 (10 L. D., 687), issued under said act, was construed to mean that said act does not authorize the making of the proofs and affidavits mentioned therein before said commissioner outside the county in which the lands are situated, subject to the exception provided for in case the lands are within an unorganized county. This construction of the act and circular has been uniformly followed by the Department up to this time and there seems to be no sufficient reason for holding that the rule in the Bowker case should be modified or changed as a general rule. But it does not follow that Morris's final proof should not be referred to the board of equitable adjudication under the facts, which are, substantially, as follows:

Morris made his entry, settled, resided upon, cultivated and improved the land in good faith, made his proof at the time, place, and before the officer designated by the register, and also tendered the necessary amount to pay the expenses of taking the proof. In all these matters he acted in good faith. He is a poor man and the fact that the proof was made in a county other than the one in which the land is situated was not due to any act or fault of his; there is no adverse claim to the land, nor protest against his proof; the question is one solely between the entryman and the government; under the circumstances it would be a serious hardship on the claimant to require him to make new proof; besides, the time within which he is required to make final proof has expired by reason of delays for which he is not to blame.

In the case of Eden Merryman (8 L. D., 406), it was held (syllabus) that:

An entry may be referred to the board of equitable adjudication where the final proof was taken at the time and place designated, but not before the officer named in the notice.

In a foot note the statement is made that:

It will be observed that the proof in this case was submitted before an officer not designated in the act of June 9, 1880.

See also John B. Burns (11 L. D., 578).

Morris's claim seems to come within these authorities, and it is therefore held that the entry of Morris may be referred to the board of equitable adjudication upon his paying to the register and receiver the proper fees and charges upon such entry, and your office is directed to require the register and receiver to notify Morris of this decision and allow him thirty days from receipt of notice within which to pay the receiver at Huntsville, Alabama, the proper amount of fees and charges upon his final proof and entry and promptly report to your office the fact of payment, in case he makes it, and thereupon the proof will be approved and his entry will be referred to the board of equitable adjudication for its action. In case Morris fails to make the payment required within the time named, upon the receipt of the report of the local officers showing his default you will cancel the entry.

Your office decision appealed from is accordingly modified.

McDONALD ET AL. *v.* HARTMAN ET AL.

Motion for review of departmental decision of August 2, 1898, 27 L. D., 290, denied by Secretary Bliss, October 31, 1898.

REPAYMENT—HOMESTEAD COMMUTED FOR TOWNSITE PURPOSES.

HENRY WAGONER.

A homestead entry commuted for townsite purposes on proof which discloses the fact, that at the date the original entry was made, it was the intention of the entryman to take the land for such purposes, is "erroneously allowed" within the terms of the statute providing for repayment.

Secretary Bliss to the Commissioner of the General Land Office, November 1, 1898.

(F. L. C.) (E. F. B.)

I am in receipt of a communication from your office, bearing date September 13, 1898, submitting for the consideration of the Department the application of Henry Wagoner for repayment of fees, commissions, and purchase money amounting to $1497.00, paid by him on homestead entry No. 7035, for the NW. ¼ of Sec. 22, T. 24 N., R. 6 W., Enid, Oklahoma.

It appears from the record that Wagoner entered upon said tract September 16, 1893, and two days thereafter applied to file soldiers' declaratory statement for the same, which was suspended to await the disposition of prior applications. These applications were withdrawn February 2, 1894, and Wagoner then made homestead entry of the tract, and at the same time his soldiers' declaratory statement was made of record. On the day following he made application to commute said homestead entry to cash entry for townsite purposes, under section 22 of the act of May 2, 1890 (26 Stat., 81), and gave notice of his intention to make final proof on March 10, 1894.

On March 9, 1894, George L. Gaffy filed protest against the granting of said application and the allowance of said entry, alleging that Wagoner did not take said land for homestead purposes and had made agreement with other parties that said entry was to be made in their interest as well as his own, and that the applications of other parties to enter said land had been withdrawn with the understanding that Wagoner should make final proof and afterwards divide with them.

On March 12, 1894, Wagoner submitted final proof, the time for taking said proof having been continued from March 10th, the day fixed in the notice, when Wagoner testified that he first settled upon the land September 16, 1893, and immediately thereafter dug the foundation of a house, which he afterwards built and occupied with his family, and was living in it with his family at the date of hearing. That the land was not settled upon for townsite purposes until a week or two weeks after September 16, 1893. That at the time he settled on the land he had no idea that the tract would be required for townsite purposes, and that he did not settle upon the land with the intention of making a townsite out of it, but to take it in good faith as a homestead for himself and family.

He also testified that he had made no agreement by which any person was to receive any portion of the land, but he admitted that he had bought out all of the adverse claimants, giving his note to each of them for $4000. After the final proof was submitted a withdrawal of the contest dated March 10th was filed with the local officers, and upon the proof submitted by claimant the entry was allowed and the purchase money was received and transmitted to the Secretary of the Interior.

While the case was pending before your office the contest was renewed and a hearing ordered thereon. Upon the testimony offered at said hearing your office found that Wagoner did not take the land with a view to making it his home but for speculative purposes; which finding was affirmed by the decision of the Department February 17, 1896, and the entry of Wagoner was canceled.

The question presented by this application is whether the commuted entry was erroneously allowed by the local officers. It is true that Wagoner in his final proof therein testified that he had made no

contract or agreement by which others were to be interested with him in the entry, and that upon the second hearing it was disclosed that the settlements made with adverse claimants were in the nature of a compromise by which they were to be interested in the land, but the final proof showed that in one or two weeks after his settlement and about four months prior to the date of homestead entry he had formed the intention to take the land for townsite purposes, and before any filing or entry had been made the land had been platted into blocks, lots, streets and alleys, which was fully disclosed by the final proof upon which the commuted entry was allowed.

Section 22 of the act of May 2, 1890, provides that in case any lands in said territory—

> which may be occupied and filed upon as a homestead under the provision of law applicable to said territory by a person who is entitled to perfect his title thereto under such laws, are required for townsite purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for townsite purposes.

Upon the face of the record the commuted entry was erroneously allowed. Although it was the intention of the claimant at the time of his settlement to take said land for the purpose of actual settlement and cultivation, yet if it appears that at the date of his homestead entry he had formed an intention to enter the land for townsite purposes, such an entry would not be within the intent and purpose of the homestead law, and if such fact was disclosed by the final proof submitted upon the application to commute, the local officers should have rejected the same and refused to allow the commuted entry.

The acceptance of the money and the issuance of final certificate by the local officers upon such proof was erroneous, and the claimant is entitled to repayment.

The application is therefore allowed.

LAND DEPARTMENT—DEPUTY MINERAL SURVEYORS.

RICHARD H. BROWN.

The discretion of surveyors-general in the matter of appointing deputy mineral surveyors will not be interfered with by the Department, unless good cause for such action is shown.

Secretary Bliss to the Commissioner of the General Land Office, November 2, 1898.
(F. L. C.) (J. L. McC.)

Richard H. Browne has appealed from the decision of your office, as set forth in its letter of July 18, 1898, declining to interfere with the action of the surveyor-general for the district of Nevada in refusing to appoint him deputy surveyor.

In support of his claim Mr. Browne sets forth that for several years prior to 1894 he had been a deputy mineral surveyor for Utah, Nevada,

and Idaho. About that date the Commissioner of the General Land Office made a ruling prohibiting any person from holding a U. S. deputy mineral surveyor's commission for any State of which he was not a resident; thereupon Mr. Browne, being a resident of Utah, resigned his deputyship for Idaho and Nevada. Subsequently, on February 23, 1895, the Department rendered a decision (20 L. D., 163), in which the Secretary said:

> Entertaining these views, I must hold that actual residence within that particular land district is not an essential requisite to the commissioning of a deputy surveyor to do the work therein. And for the same reasons I see no objection to a party holding at the same time commissions as deputy mineral surveyor in more than one State or land district.

Upon the rendition of the departmental decision above quoted from, Mr. Browne applied to be restored to his deputyship in Idaho, and his application was granted. On April 14, 1898, he applied to the surveyor general of Nevada to be reinstated in his position as deputy mineral surveyor in that State, setting forth numerous reasons why such reinstatement should be made—the principal being that certain parties named, resident in Salt Lake City, Utah, were the officers and principal owners of mines in Nevada, and urgently desired that he, and no one else, should attend to the matter of surveying, or completing or correcting the surveys, of their claims in that State. There are in the record copies of letters from said parties, protesting against their being compelled to employ deputy surveyors in Nevada, of whom or of whose ability and integrity they know nothing.

The surveyor-general for Nevada refused to reinstate Mr. Browne as a deputy surveyor for that State, giving as his reasons (in a letter to him dated April 22, 1898):

> There are at present more deputy mineral surveyors in this State than the depressed condition of mining and business generally will support; that the occupation of these surveyors is of a skillful, technical character, upon which they rely for a livelihood; they are located at different, remote parts of our State, and their residence here is a matter of great convenience to our citizens; that to employ a large number of deputy mineral surveyors residing without the borders of this State, as I have been asked to do, would have the effect of curtailing or depriving these professional men of their means of support, and compelling them to seek other places of residence, thus causing our citizens much inconvenience, and compelling the residents of this State who might require the services of a surveyor to send out of the State and pay much more for such services than at present.

From this action of the surveyor-general in refusing to reinstate him, Mr. Browne appealed to your office, which declined to interfere in his behalf. Mr. Browne has appealed to the Department—reiterating therein his argument before your office, in which he said (*inter alia*):

> My contention is, that I do not ask for an original appointment, but for restoration; that if it had not been for a ruling of the Hon. Commissioner of the General Land Office which the Hon. Secretary of the Interior subsequently pronounced to be in error, I would not have been requested by the surveyor-general for Nevada to resign my deputyship; and as he could not have removed me except for cause, therefore I would be a deputy mineral surveyor today; that the reversal of the Hon.

Commissioner's ruling by the Hon. Secretary carries with it a reversal of all the immediate consequences of said ruling; that as the loss of my commission was an immediate consequence of the Hon. Commissioner's ruling, so the restoration of my commission is a natural and logical consequence of the reversal of said ruling by the Hon. Secretary of the Interior. . . . . The U. S. statutes reads: "The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mineral claims," etc. Incompetency, therefore, is the only statutory bar against the appointing of an applicant to a mineral deputy surveyorship. The law never contemplated giving him the power of appointing only his friends, and thus retaining the surveying business in the hands of a few . . . . . The entire contention is a special plea against the statute, and against the ruling of the Hon. Secretary of the Interior, the practical effect of which it thus attempts to nullify.

In the Helmick case, to which Mr. Browne refers, the Secretary said (20 L. D., 163):

I must hold that actual residence within that particular land district is not an essential requisite to the commissioning of a deputy mineral surveyor to do the work therein; and for the same reasons I see no objection to a party holding at the same time commissions as deputy mineral surveyor in more than one State or land district.

In the case of William E. Jacobs (21 L. D., 379), the Secretary, commenting upon the Helmick case and the provision of Sec. 2334 R. S., quoted (*supra*) by Mr. Browne, said:

The decision in the Helmick case . . . . . holds that "it is not an essential requisite to the appointment of a deputy mineral surveyor that he should be an actual resident of the land district for which he is commissioned." This does not, however, in my opinion, render it compulsory upon the surveyor general to appoint every person resident outside of the State, who may apply to be appointed, his deputy. I think that a certain discretion in this respect should be allowed the surveyor general; and therefore do not feel called upon to interfere in this case and order an appointment which he deems unnecessary and improper.

The office of surveyor-general is one of high and grave responsibility. He is responsible, among other things, for the accuracy of the surveys made by the several deputy surveyors. He is under bonds, in the sum of thirty thousand dollars, for the faithful performance of the duties of his office (Sec. 2215 R. S.). It is safe to presume that he understands, better than any one at a distance can, the condition of affairs in the district within his immediate supervision. It is not to be presumed that he would sacrifice the correctness of the surveys of public lands, and the interests of the community and the government, by appointing only his friends, whether competent or not, to responsible positions. Therefore, while surveyors-general are to a certain extent within the jurisdiction and general supervision of this Department, a prudent and proper policy would dictate that their discretion, in reference to appointments of deputies, as in other matters, should not be interfered with unless good reason for such interference be clearly shown. The Department sees no sufficient reason for interfering in the present case to order the surveyor-general of Nevada to make an appointment which he deems unnecessary and improper.

The decision of your office is affirmed.

RIGHT OF WAY—RESERVOIR—SECOND MAP—TRANSFEREE.

FRANKLIN F. NOXON ET AL.

Where a reservoir right of way has been approved, but the reservoir is not constructed within the statutory period, a transferee of the reservoir company may be permitted to file a new map of location, to operate only upon such portions of the public lands as are free from any claims or rights at the date of the approval of said map; and in such a case the later application of another party for a right of way covering practically the same ground must be rejected.

Secretary Bliss to the Commissioner of the General Land Office, November 2, 1898.

(F. L. C.) (C. W. P.)

On September 13, 1898, you transmitted the appeals of Franklin F. Noxon and Peter J. O'Reilly from your office decision of June 20, 1898, rejecting their applications for reservoir right of way under sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095).

It appears from the record that on February 3, 1898, Franklin F. Noxon filed in the land office at Leadville, Colorado, a map in duplicate of the Tarryall reservoir, as an application for a right of way to certain lands for the purposes of irrigation in the Leadville land district, Colorado, under said act, and from the appeal of Mr. Noxon it appears that he claims said right of way, as the transferee of the Tarryall Reservoir and Ditch Company.

The transfer of the reservoir rights of said company carried with it whatever right of way had been acquired by said company under said act, and you state that the records of your office show that, on February 4, 1893, the Department approved a map filed by the Tarryall Reservoir and Ditch Company, showing a reservoir upon the same location. But the Tarryall Reservoir and Ditch Company having failed to build its reservoir within the five years required by the 20th section of said act, there seems to be no reason why the transferee of the company should be denied the right to file a new map of location, to operate only upon such portions of the public lands as are free from any claim or right at the date of the approval of the new map of location. This action would be in accordance with the decision of the Department in the case of the Montana Railway Company, 21 L. D., 250, which arose under the act of March 3, 1875 (18 Stat., 483), granting to railroads the right of way through the public lands, and the views therein expressed are equally applicable to the present case.

Subsequently, on February 25, 1898, Peter J. O'Reilly filed in the Leadville office a map in duplicate of the Rampart reservoir, as an application for a right of way under said act of March 3, 1891.

It is stated in your office decision that the reservoir located by the map of the Rampart reservoir covers practically the same ground as the Tarryall reservoir, as represented upon the map which was approved by the Department on February 4, 1893, as already stated. Your office therefore rejected this application, holding that, when a

right of way for reservoir purposes has been acquired, under said act, a map for the same location should not be approved.

It seems proper, under existing circumstances, for the Department to withhold its approval of said map, and your rejection of the application of Mr. O'Reilly is approved. But you will examine the map submitted by Mr. Noxon, as to its conformity with the regulations adopted by the Department to carry into effect the act of March 3, 1891, and report upon it with recommendation.

HOMESTEAD—ADDITIONAL ENTRY—SECTION 6, ACT OF MARCH 2, 1889.

MAY *v.* COLEMAN.

A homesteader who has perfected an entry for eighty acres and thereafter makes entry for a tract of one hundred and sixty, may be permitted, on relinquishment of eighty acres, to retain the remainder, where bad faith is not shown, and it appears that under section 6, act of March 2, 1889, he is entitled to make an additional entry of such amount; and the right to thus amend his entry will not be defeated by a contest charging the invalidity of said entry as an entirety.

Secretary Bliss to the Commissioner of the General Land Office, November 2, 1898.

(F. L. C.) (C. W. P.)

Jacob W. May has appealed from your office decision of March 6, 1897. The land involved is the NE. ¼ of Sec. 35, T. 28 N., R. 3 E., Perry land district, Oklahoma Territory.

The record shows, that on September 28, 1893, James A. Coleman made homestead entry of said land. On July 5, 1894, May filed his affidavit of contest, charging that Coleman, on May 15, 1877,

filed his homestead entry of the S. ½ of the SW. ¼ of Sec. 22, T. 14 S., R. 1 E., in Dickinson Co., Kansas, submitted final proof on the same, October 6, 1881, and patent was issued in April, 1882; the tract contained eighty acres.

On July 26, 1895, he filed an amended affidavit of contest, alleging that Coleman has

totally exhausted his homestead right and has had the benefit of the homestead law, and is thereby disqualified from acquiring title to the tract of land herein involved.

A hearing was held, on April 3, 1896, when May appeared, but Coleman made default. Upon the record evidence and the testimony of the contestant and one R. L. McCormack, adduced by the contestant, the register and receiver, on April 3, 1896, held that the contestant had sustained the charges made in his contest affidavit, and had proven to their satisfaction that Coleman's entry was fraudulent and voidable at inception, and should be canceled, and they so recommended. Coleman appealed.

At the hearing the contestant swore that Coleman told him that he had previously made a homestead entry in Kansas, and that he had commuted it; and he offered in evidence certified copies of the original

and final papers in the Kansas entry, showing that Coleman, on May 15, 1877, in the Salina, Kansas, district, made homestead entry No. 18,287 of the S. ½ of the SW. ¼ of Sec. 22, T. 14 S., R. 1 E., upon which he made final proof, on which final certificate No. 6240 issued October 6, 1881, and that patent issued April 29, 1882; that he did not commute said entry under section 2301 of the U. S. Revised Statutes, but made proof of his compliance with the homestead law as to residence and cultivation for a period of five years, less the term of his military service; also a certified copy of the homestead affidavit of Coleman for the land in controversy, in which Coleman swore that he had not "heretofore made entry under the homestead laws or filed a soldier's declaratory statement."

On January 16, 1897, Coleman filed in your office a relinquishment of the S. ½ of said NE. ¼, executed January 5, 1897, accompanied with his affidavit, alleging, in substance, that, prior to the opening of the Cherokee Outlet, he made homestead entry and final proof upon eighty acres of land, and in making said proof he received credit on the period of residence for his time of service in the army of the United States; that before coming into Oklahoma, he was informed that the rights of parties in his position had been restored by general act of Congress, and after settling upon his homestead he made application to enter the same, employed an attorney to make out his papers for application, and informed his attorney at that time of the fact that he had made a former homestead entry in the State of Kansas; that his attorney asked him the question whether or not he lived upon the land five years, and he answered that he did not, and stated to him the facts in relation to said proof, and that he was advised that his rights were fully restored, and he made entry in perfect good faith; that at that time there was a great hurry to get entries into the land office and a large crowd of people, and he supposed his affidavit stated the full facts in relation to his former entry; that he has never at any time denied the making of said entry, has never sought to evade the law in any manner whatever, and has placed valuable and permanent improvements upon said land; that he is a man with a large family depending upon him and his labor for support, and being now advised that he was entitled to enter but eighty acres of land, tenders a relinquishment for eighty acres of the tract covering that portion of the tract upon which his improvements are not placed.

On March 6, 1897, your office held that Coleman was clearly entitled under section 6 of the act of March 2, 1889 (25 Stat., 854), to make an additional homestead entry of eighty acres, accepted his relinquishment, and canceled his entry as to the S. ½ of the said NE. ¼, held his entry as to the N. ½ of said NE. ¼ intact, and awarded the S. ½ of said NE. ¼ to the contestant.

The contestant appeals to the Department.

It has been the uniform ruling of the Department that the law allows

but one homestead privilege, and that privilege is generally exercised when a qualified claimant makes entry under the homestead law. But Congress has established some exceptions to the general rule. Among these is the exception contained in section six of the act of March 2, 1889 (25 Stat., 854), which admits of an additional entry by a person who has complied with the conditions of the law with regard to his original entry and has had final papers issued thereunder, for less than one hundred and sixty acres, of so much additional land as added to the quantity previously entered by him shall not exceed one hundred and sixty acres. And this provision is declared to be applicable to the Cherokee Outlet. (See act of March 3, 1893, 27 Stat. 642; act of March 2, 1889, 25 Stat., 1005, and President's proclamation of August 19, 1893, opening the Cherokee Outlet to settlement, 17 L. D., 243.)

The record shows that at the time Coleman entered the land in controversy, he was entitled, under said section six of the act of March 2, 1889, to make an additional homestead entry of eighty acres of land. He made entry of one hundred and sixty acres, under the belief, as he swears, that he was entitled to make entry for that quantity of land. Why should not he be allowed to relinquish eighty acres of the land entered by him and retain the eighty acres, to which he was entitled at the time he made his entry of one hundred and sixty acres?

There are only two reasons alleged why he should not, which require consideration:

1. Because, when he made his homestead affidavit, alleging that he had not "heretofore made entry under the homestead laws, or filed a soldier's declaratory statement," he was guilty of delibrate fraud and perjury, and should not therefore be allowed to retain any part of said land.

2. Because Coleman, after he instituted his contest, had a vested right and interest in the land in controversy, if he successfully prosecuted his contest, of which he would be unlawfully deprived, if Coleman were allowed to relinquish his claim to eighty acres of the land involved and retain the other eighty acres.

1. If Coleman made a fraudulent attempt to acquire title to the land and knowingly swore that he had not previously filed a soldier's declaratory statement or made entry under the homestead laws, it is perfectly clear that his entire entry should be canceled.

The testimony adduced by the contestant, at the hearing, is not inconsistent with the facts set up in Coleman's affidavit and does not show that Coleman intended to commit a deliberate fraud upon the government, or knowingly swore to a barefaced falsehood. Accepting, then, the statements in the affidavit as true, Coleman's entry of the eighty acres to which he was entitled should not be held to be invalidated by the entry of the eighty acres to which he was not entitled.

2. As to the other objection, it is to be observed that the preference right of entry, which is here insisted on, is only extended by the act of

May 14, 1880 (21 Stat., 140), to one who "has procured the cancellation" of an entry, and if, upon legal or equitable grounds, the Department holds that an entry should not be canceled, can it be said that the contestant is thereby deprived of the legitimate fruit of his diligence in bringing the case to the notice of the proper authorities? Surely not.

In the case of Jones *v.* Pinkston, 2 L. D., 38, an amendment of an entry during the pendency of a contest, which deprived the contestant of his preference right, was allowed. The Department said:

> Jones had not acquired an adverse right at this date, and the allowance of the application was not within the rule which prohibits an amendment of a filing or an entry, after acquisition of such right,

and in the unreported case of Salmons *v.* Goss, decided on July 1, 1888, although the charges in the affidavit of contest were supported by the testimony, the Department reversed the judgment of your office, on the ground that the evidence showed the good faith of the entryman and that his laches were partly caused by unfavorable climatic conditions, and in part by other circumstances largely beyond his control, saying:

> In view of the apparent good faith and equities of the entryman, and the fact that there is nothing in the right of the contestant to require the United States to deny the entryman the privilege which would otherwise be afforded him in equitable consideration and fair dealing, I think the contest should be dismissed.

For these reasons, your office decision is affirmed.

REPAYMENT—DESERT LAND ENTRY.

JANE M. SMITH.

A desert land entryman who fails to secure water sufficient to irrigate the entered tract, and thereupon asks and obtains leave to take other land in lieu of that first entered, is not entitled to repayment of the money paid on the first entry.

Secretary Bliss to the Commissioner of the General Land Office, November 2, 1898.

(F. L. C.) (C. J. G.)

October 19, 1892, Jane M. Smith made desert land entry No. 2682 for the S. ½ of Sec. 13, T. 32 N., R. 22 E., Helena land district, Montana.

January 27, 1896, the local office transmitted her application to amend said entry so as to allow her to take in lieu of the land described therein, the SE. ¼ of Sec. 29 and SW. ¼ of Sec. 28, T. 32 N., R. 23 E.

The affidavit filed in support of said application sets forth that at the time of making entry she expected to obtain her water supply from Milk river, through the ditch of the Harlen Irrigation Company, having been informed that the survey of the ditch showed that it would cover her land; that she purchased stock in the ditch to the amount of more than $700.; that the ditch being now completed she has ascertained that it is too low to irrigate the lowest portion of her claim; that there is no other means of irrigation, a fact which renders the

land worthless; that she used every reasonable precaution in selecting the claim and has made yearly proof since, expending $320. towards reclaiming it; and that she has not attempted to dispose of the land.

February 20, 1896, your office, after setting forth the facts as above, rendered decision as follows:

It is held, under these circumstances, that Smith should not be restricted to the land entered, inasmuch as she could not know, until after completion of the ditch, that it would not serve to irrigate her claim. Her entry, No. 2682, is, accordingly, canceled and she is hereby allowed thirty days in which to make entry of the said SE. ¼ of Sec. 29, the SW. ¼ of Sec. 28, T. 32 N., R. 23 E.

In pursuance of this holding Smith made second desert entry of the land last described.

June 9, 1896, she addressed a letter to your office, in which, after stating that she was compelled to pay $80. on her second entry, requested consideration of the matter and if possible the repayment of a like amount paid by her on the original entry.

June 26, 1896, your office replied to this letter, stating that the entry was canceled because of the entryman's failure to secure water to irrigate the land. The said reply continued as follows:

The records of this office do not show that this entry was erroneously allowed or that it was canceled for conflict but it appears that you have not complied with the law under which you made entry.

The law governing the return of purchase money does not apply to cases of this character and the application is accordingly denied (12 L. D., 78).

March 13, 1897, Smith, through her attorneys, filed her formal application for repayment of the purchase money, fees and commissions paid on entry No. 2682.

March 24, 1897, your office replied to the attorneys as follows:

I have to inform you that Mrs. Smith's application for repayment was denied by office letter June 26, 1896, and the case closed November 24, 1896. The second application for repayment is accordingly denied.

Smith has now filed an appeal to the Department, in which the following errors are specified:

1. In treating her application filed March 13, 1897, as a second application.

2. In holding that applicant's right of repayment had been adjudicated.

3. In overlooking the fact that the so-called application on which the letter of June 26, 1896, was based was simply an informal letter of inquiry by appellant, requesting a refund of the $80 paid on the canceled entry and in no respect complying with the regulations prescribing the form in which an application for repayment shall be made.

4. In enforcing a rigorous construction of the doctrine of *res judicata* against this applicant, the question being solely between her and the government.

5. In overlooking the fact that in the letter of June 26, 1896, to claimant in person, she was not notified of her right of appeal.

6. In holding, in the letter of June 26, 1896, that Mrs. Smith's entry was canceled because of her failure to secure water with which to irrigate her land and in overlooking the action taken by letter "G" of Feb. 20, 1896, canceling the entry and allowing appellant's application to enter the SE. ¼ Sec. 29 and SW. ¼ Sec. 28, T. 32 N., R. 23 W., in Helena, Mont., district, in lieu of the land covered by the canceled entry.

7. In not taking into account the fact that appellant has made her second entry, being D. L. E. No. 3235, Helena series, in accordance with said letter "G" of Feb. 20, 1896, and that she paid the first installment of purchase money a second time.

The issue involved being one solely between the government and the applicant the Department, under its supervisory power, will, in view of the circumstances, waive any irregularities in this instance and dispose of the case on its merits.

It may be remarked in this connection that the privilege accorded the entryman in allowing her to change her entry can not be regarded as a recognition of her right to repayment of the purchase money paid on the abandoned entry. The allowance of a change of entry is a matter within the sound discretion of the Land Department, while repayment is controlled by statute expressly enumerating in what instances it may be made. It is held that, however just a claim for repayment may be, in the absence of a statute expressly authorizing such repayment the Department is without power to grant relief.

It appears from Smith's own statement that she purchased stock in the Harlen Irrigation Company's ditch, and that she expected to obtain her water supply for the purpose of reclaiming the land embraced in her entry No. 2682, from that source. In paragraph 10 of the instructions of your office of June 10, 1887, (5 L. D., 708) it is stated, among other things, that a person who makes a desert land entry before he has secured a water right does so at his own risk. In the case of S. V. Rehart (19 L. D., 505), it was held that the purchase of an irrigating ditch was not obtaining a water right; that upon failure to acquire such right prior to entry a person proceeds at his own risk; and that such failure is not chargeable to any fault on the part of the government in allowing the entry.

An attempt is made in the appeal to distinguish the Rehart case from the one under consideration. But the doctrine announced therein, and as here set forth, is clearly applicable to the case at bar. The other cases cited in the appeal are not deemed pertinent to this case.

It is very apparent that the entry in question was properly allowed and might have been confirmed but for the entryman's failure to secure water to irrigate the land, which was undertaken at her own risk. Repayment of purchase money paid on her original entry was therefore properly denied under the statute. The said money could not be transferred to the second entry for the reason that said entry was made at her own request and was not the result of any error on the part of the government in allowing the original entry.

In the case of Lucy C. Hallack (24 L. D., 542), the entryman failed to reclaim part of the land embraced within her entry, and thereupon relinquished such tract. The Department in disposing of said case held—

the land was subject to entry and was regularly entered. No error or mistake, of any kind, with respect to the entry, was made, it was simply an error of judgment on the part of the entryman, as to whether the portion of the entry afterwards

canceled, could be reasonably and successfully reclaimed. The land embraced by the entry was voluntarily selected by the entryman, but failing to reclaim a portion of the entry, she executed a relinquishment of the portion and, hence the cancellation.

Repayment was therefore denied in that case in face of the alleged impossibility of reclaiming the portion of the entry for which repayment was asked.

In the case of Jens C. Hansen, 21 L. D., 209, repayment was denied on the ground (syllabus):

Where a second homestead entry is allowed repayment of the fees and commissions paid on the first entry will not be granted, in the absence of such error on the part of the government in allowing said entry as would defeat its confirmation.

It is conceded in the appeal that "literally, perhaps, the entry was not 'erroneously allowed,' but it was allowed under the erroneous belief that the land was susceptible of irrigation and could not therefore be confirmed." It is apparent, however, that the error made was within the control of the entryman, while the repayment statute contemplates that the error must be one committed by the government.

Your office decision is hereby affirmed.

SETTLEMENT RIGHT—WAIVER OF PREFERENCE RIGHT.

MAUERMAN *v.* BAKER.

In the case of a successful contest against a homestead entry on the ground of abandonment, where the contestant waives his preferred right and a third party makes entry of the land, the former entryman can not defeat such entry on the ground that he was residing on the land at the time said entry was allowed, if he fails to assert his settlement claim within three months after the waiver of the contestant's preferred right.

Secretary Bliss to the Commissioner of the General Land Office November 9, 1898.

(S. V. P.) (C. J. G.)

June 2, 1883, Robert Mauerman made homestead entry for the E. ½ SW. ¼ and N. ½ SE. ¼, Sec. 2, T. 13 N., R. 5 W., Vancouver land district, Washington.

September 14, 1887, Solon Allen filed affidavit of contest against said entry, alleging abandonment.

January 5, 1891, as a result of said contest, your office canceled Mauerman's entry and Allen was allowed thirty days within which to exercise his preference right.

February 3, 1891, Allen waived his preference right and the same day Robert L. Baker made homestead entry for the land.

October 4, 1895, Mauerman filed affidavit of contest against Baker's entry, alleging among other things that he had continuously resided on the land in controversy since October, 1883; that because of his residence on said land at date of Baker's entry he had a superior right thereto over all others except Allen, and had ninety days in which to

assert said right; that Baker is not now residing on the land and has never resided thereon for the purpose of making it his home: and that Baker's entry was made in collusion and for speculative purposes.

The local office rendered decision, after hearing, recommending dismissal of Mauerman's contest and that Baker's entry remain intact.

October 20, 1896, your office affirmed the action of the local office, holding among other things—

> Mauerman's contention, that because he was a settler and residing on the land when Allen's preference right to make entry had expired, he was entitled to make entry over every one else, was not sufficient for a cause of action in the face of an intervening claim, unless he had made application to enter, alleging prior settlement, or filed an affidavit of contest alleging that fact, within three months from the date the land again became subject to entry.

Your office also found that Baker has practically made the land his home since July 11, 1891, and that the charge of collusion against him had not been sustained.

July 26, 1898, the Department concurred in the finding of your office, concluding as follows:

> The record in this case fully sustains the finding of facts by your office. Mauerman's entry was made June 2, 1883, and was canceled January 5, 1891. Baker's entry was made February 3, 1891, the day on which Allen's preference right expired, and Mauerman did not contest the same until October 4, 1895. On account of his failure to thus take earlier action, he forfeited whatever rights he might otherwise have had by reason of his alleged settlement claim and Allen's failure to exercise his preference right.

Mauerman has now filed a motion for a review in which it is alleged, substantially, that he was residing on this land at the time his entry was canceled and at the time Baker made entry; that such residence constituted notice to Baker of an adverse claim; that he had a superior right for ninety days to file on the land over every one except Allen, and Baker therefore made his entry subject to Mauerman's right; that Allen waived his preference right and Baker was allowed to make entry within the thirty days allowed Allen to enter, therefore Mauerman was not compelled in order to preserve his right to file contest against Baker within ninety days, but could do so any time within the period allowed the latter to offer his final proof, or protest against the allowance of said proof, on the ground that Mauerman was living on the land when Baker made entry and that Baker had knowledge of such residence. It is therefore contended that the Department erred in holding that Mauerman forfeited any rights he may otherwise have had by the delay in filing his contest.

It will be observed that while Baker's entry was made within the thirty days allowed Allen to exercise his preference right, it was not made until after Allen had waived said right and therefore at a time when the land was subject to entry. If Mauerman therefore had any superior right by reason of his settlement at the time Baker made entry that would defeat said entry, it was incumbent upon him to assert said

right within the statutory period. And the fact that Baker made entry within the thirty days allowed Allen to enter can not be offered as a proper excuse for his failure to do so. Under the homestead law an intervening adverse claim defeats a settlement right if not asserted within three months from date of settlement. In this case Mauerman had been successfully contested by Allen on the ground of abandonment. Hence he had no right except what accrued to him by reason of Allen's failure to exercise his preference right, and was not entitled to credit for his residence prior to the time Allen waived said right. He can not therefore justly claim greater privileges in the face of an adverse entry than a regular settler who must, at the risk of losing his right assert the same within three months from date of settlement. See case of Burrus *v.* Cantrel (15 L. D., 397), wherein it is held (syllabus):

A contest, based solely on an alleged prior settlement right, to be effective as against a subsequent entry of record should be brought within the period provided by law for the assertion of settlement claims.

See also cases of Rumbley *v.* Causey (16 L. D., 266), and Huntsbarger *v.* Eickman (Id. 270).

Mauerman not only did not contest Baker's entry within the three months required, but did not file his contest for more than four years after said entry was made.

The motion for review is hereby denied.

SETTLEMENT RIGHT—UNSURVEYED LAND—DESERT ENTRY.

LONDGREN *v.* RUDELLAT.

A settlement claim, on unsurveyed land that is subsequently included within the desert land entry of another, will defeat the preference right of one who successfully attacks said entry, if duly asserted on the survey of the land.

Secretary Bliss to the Commissioner of the General Land Office, November 9, 1898.

(S. V. P.) (C. W. P.)

The case of Andrew Londgren against Dominic Rudellat involving the S. ½ of the NE. ¼ and the N. ½ of the SE. ¼ of Sec. 1, T. 2 S., R. 1 E., Salt Lake City land district, Utah, has been examined.

December 27, 1886, Dinsmore H. Sanders made desert land entry of said land, then unsurveyed. This entry was canceled by relinquishment, December 13, 1889, and on the same day Julius C. Brown made desert land entry of the same land.

August 14, 1893, Dominic Rudellat filed an affidavit of contest, attacking Brown's entry. A hearing was held September 28, 1893, when Londgren, claiming to be a settler on the land, filed an application to be allowed to intervene and protect his settlement claim. The local officers denied this motion. Londgren did not appeal. As the result of the contest, Brown's entry was canceled, May 11, 1894.

May 22, 1894, Londgren filed a protest against the allowance of entry by Rudellat, alleging that he (Londgren) was an actual settler on the land. May 25, 1894, Rudellat filed his desert land application for the said tract, together with lot No. 2 of the same section. The local officers rejected this application because the plat and affidavits showed that a portion of the land had been plowed and was under cultivation. Rudellat appealed.

Your office, July 24, 1894, declined to render a decision on said appeal until after the land was surveyed, and, November 22, 1895, the Department held that your action was proper.

The record shows that the plat of the township was officially filed May 20, 1895, and that on the same day Londgren filed his homestead application for the said S. ½ of the NE. ¼ and the N. ½ of the SE. ¼.

A hearing was ordered by your office to determine the conflicting rights of the parties, and was held June 18, 1896. The local officers found in favor of Londgren and recommended the rejection of Rudellat's application and the allowance of that of Londgren. Rudellat appealed.

Your office affirmed the judgment of the local officers, saying:

> The evidence sustains your findings of fact. Londgren, with the intention of making a homestead entry of the land, settled on it in 1887. The public survey of the township had not been made when he settled, and when it was made he found that his cabin was about thirty feet off the land which he claimed. He at once moved it on the land. From the time of his settlement to the date of the hearing he resided in said cabin, cultivating and improving a portion of the land. He has exercised good faith and attempted to protect his settlement rights, even before the land became subject to homestead entry.
>
> Unsurveyed land can be entered under the desert land laws, but not under the homestead laws, and, although Londgren was a bona fide settler on the land when Sanders' entry was canceled, he could not assert his right by placing his claim of record, and the same was true when Brown's entry was canceled on Rudellat's contest.
>
> Londgren was a settler on the land long before either Brown or Rudellat claimed it, and in my opinion his settlement claim is superior to the preference right claim of Rudellat.

Rudellat appeals to the Department.

There is no error in your office decision. The fact that Londgren built his cabin about thirty feet from the east line of his claim did not defeat his claim to the land, as the evidence shows that upon the discovery of his mistake, he immediately removed it to his claim and continued his residence therein. (Smith *v.* Brearly, 9 L. D., 175; Staples *v.* Richardson, 16 L. D., 248; United States *v.* Montoya, 21 L. D., 52.)

The decision of your office, rejecting Rudellat's application to enter said land under the desert land law and allowing Londgren's homestead application for the same, is accordingly affirmed.

HOMESTEAD ENTRY—MINOR HEIRS.

ROONEY *v.* BOURKE'S HEIRS.

On the death of a homestead entryman, leaving minor heirs, the wife having previously died, such heirs are entitled to patent, on proof of compliance with law on the part of the entryman up to the time of his death, the fact of minority at such time, and the death of both parents.

Secretary Bliss to the Commissioner of the General Land Office, November 10, 1898.

(S. V. P.) (E. F. B.)

This case arose upon the contest of Samuel J. Rooney, Jr., against the homestead entry made January 10, 1893, by John C. Bourke, for lots 1 and 2 and the S. ½ of the NE. ¼, Sec. 6, T. 20 S., R. 64 W., Pueblo, Colorado, alleging that said entryman died April 8, 1894, and that prior to his death he did not reside upon the land except for a short time in the summer of 1893; that no member of his family has ever established a residence thereon, and has never cultivated said land; and that the entry was not made in good faith for the purpose of residence and cultivation, but for speculative purposes. Service was made upon Geoffrey R. Bourke, administrator of the estate of the entryman and guardian of his minor heirs.

The local officers made no finding of fact, but decided that from an examination of the testimony the claimant failed to comply with the requirements of the homestead law in the matter of residence upon and cultivation of the tract embraced in his entry.

Upon the appeal of the heirs of Bourke, your office found that it was shown by the testimony that the entryman established residence on the land in February, 1893, and built a comfortable two-room house and a stable; that he contracted for the digging of a well, which was dug to the depth of forty feet, when the party engaged in digging it quit; that he had various articles of household furniture in his house, which he occupied until April 1, 1893, when, on account of a hemorrhage of the lungs, he removed to a neighbor's house, where he staid a week, until he had recovered sufficiently to return to his claim. About the middle of October, 1893, he had another hemorrhage and was then taken to a neighbor's house, from whence, on or about November 11, he was removed to a hospital in Pueblo, where he died April 8, 1894.

Your office determined from the facts that the entryman had complied with the homestead law in good faith up to the time of his death, and it appearing from the record that the only heirs of the said Bourke were his three children, Walter, Cecil and Olive, aged, respectively, twelve, eight and six years, his wife (their mother) having died in 1889, you decided that under the rule in Curran *v.* Williams' Heirs (20 L. D., 109) they were entitled to patent upon submission of final proof in regular form showing compliance with the law by the entryman and the death of both parents.

From this decision the contestant has appealed, alleging the following grounds of error:

1. In holding that the register and receiver had not made a proper finding of facts under Rule 11, of the Rules of Practice; and holding that the opinion of the local officers set out only "a conclusion of law, not a finding of fact."

2. In finding from the evidence that claimant, prior to his decease, complied with the requirements of the homestead law in the matter of residence, cultivation and improvement of the land.

3. In failing to find from the evidence that after claimant's decease and down to date of the contest there was no compliance with the law by claimant's heirs or legal representatives in the matter of cultivation, use, or improvement of said land.

4. The decision is contrary to the evidence.

5. The decision is contrary to law.

There is no error in your decision. The local officers' decision was a mere conclusion of law based upon no finding of fact, but your office, in the proper exercise of a jurisdiction vested in it by law, examined the testimony, and upon a finding of fact which is fully sustained by the testimony, held that the entryman had in good faith complied with the law up to the time of his death and that the right and fee in said land inured to the benefit of his minor children without being required to make further compliance with the homestead law as to improvement and cultivation of the tract.

The only ground upon which any question as to the *bona fides* of the entryman could be maintained is the absence of cultivation of the tract. But it is shown that the land is arid in character and will not produce crops in ordinary seasons without irrigation. It can be used profitably for stock raising if water is secured, and it was evidently his purpose to supply water for this purpose from wells which he failed to have dug before his death. The condition of his health during the short time intervening between the date of his entry and his death would not permit of much effort at improvement in this respect, but in view of his efforts in this direction and of his expressed wish and hope that his health would be sufficiently restored to enable him to return to the claim, such failure does not furnish sufficient ground to impeach his good faith.

Your decision is affirmed.

SETTLEMENT RIGHTS—SOLDIER'S HOMESTEAD DECLARATORY STATEMENT.

JARED *v.* REEVES.

A soldier's homestead declaratory statement does not segregate the land covered thereby, and is therefore not subject to contest, hence the proper method of asserting a settlement claim adverse thereto is by application to make entry within the statutory period after settlement.

While a homestead declaratory statement is no bar to the allowance of an adverse entry, such entry is however made subject to the subsequent assertion of rights under said declaratory statement, and if entry is made thereunder, the intervening adverse entry is excluded by operation of law.

On the allowance of a homestead entry, based on a prior declaratory statement, where there is an intervening adverse entry of record, the local office should at once advise the intervening entryman of such action, and give him opportunity to assert whatever rights he may have in the premises.

One who files a soldier's declaratory statement will not be heard to allege settlement prior thereto, if he fails to assert his settlement claim within three months from the date of the alleged settlement.

Secretary Bliss to the Commissioner of the General Land Office, November 11, 1898.

(S. V. P.) (W. A. E.)

The record in the case of John Jared *v.* Samuel Reeves, involving the NE. ¼ of Sec. 19, T. 20 N., R. 8 W., Enid, Oklahoma, land district, shows the following state of facts:

November 3, 1893, Reeves filed soldiers' declaratory statement for the above-described tract, upon which he made homestead entry March 13, 1894.

December 13, 1893, after Reeves had filed his declaratory statement, but before he had made entry thereon, Jared filed homestead application for the same land. Owing, however, to the press of business in the local office, the receiver's receipt was not issued and the entry made of record until December 18, 1893.

April 17, 1895, Jared filed affidavit of contest against Reeves' entry, alleging prior settlement.

A hearing was duly had and resulted in a decision by the local officers recommending that Reeves' entry be canceled.

On appeal, your office affirmed the decision below, whereupon Reeves filed further appeal to the Department.

The first question to be considered is whether Jared's contest, on the ground of prior settlement, was filed in time.

He alleges settlement September 16, 1893, but his affidavit of contest was not filed until April 17, 1895, nineteen months after the date of his alleged settlement. Within three months from the date of his settlement, however, he filed his homestead application for the land and this application was allowed and placed of record. This was the only way in which he could assert his settlement rights within the three months allowed him by law, as Reeves' declaratory statement did not segregate the land and was therefore not subject to contest. (Lachapelle *v.* Herbert, 18 L. D., 494.) While this entry remained of record it effectively protected his settlement rights, notwithstanding the fact that in his homestead papers he made no specific allegation of settlement.

This entry was, however, subject to Reeves' declaratory statement and was excluded by operation of law when Reeves made homestead entry, on March 13, 1894, upon said declaratory statement. On page 23 of the General Circular of 1896, it is said:

Following the accepted practice in pre-emption cases, the filing of a declaratory statement will not be held to bar the admission of filings and entries by others; but

any person making entry or claim during the period allowed by law for entry of the soldier will do so subject to his right; and the soldier's application when offered within such time will be allowed as a matter of right and operate to exclude the intervening claim.

Reeves was entitled, then, to have his homestead application allowed and placed of record when presented, but Jared also had some claims to consideration. It was the duty of the local officers, immediately upon the allowance of Reeves' application, to notify Jared of the action taken and give him an opportunity to assert whatever rights he might have in the premises. Jared would then have had a reasonable time in which to institute a contest against Reeves' entry on the ground of prior settlement. It does not appear, however, that any such notice was ever served upon Jared, and it must therefore be held that he is not in default in the matter of instituting his contest within the proper time. This brings us to a consideration of the testimony submitted at the hearing.

The record shows that Jared reached the tract in controversy about ten minutes past twelve on September 16, 1893. He immediately hung a flag on top of a bush and spent the balance of the afternoon looking for corners. The next morning he threw up a mound and run the lines and about noon he started to Hennessy to get provisions and bedding. Before leaving he employed a man to begin a well on the land. September 19, 1893, he returned to the land and commenced getting out logs to build a house. He completed his house and moved into it in November 1893. Prior to that time he had been sleeping in a rude tent which he had made with poles and pieces of wood. In March 1894, he built another house. At the date of the hearing his improvements consisted of a house sixteen by eighteen feet in size, connected by an open hallway with another house twelve by fourteen feet in size; a well, stable, cave, fifty acres in crop, and forty acres enclosed for a pasture. He has resided continuously on the land since September 1893.

Reeves claims to have settled on the tract in question September 16, 1893, prior to Jared's settlement. In the recent case of Thomas *v.* Reed *et al.* (27 L. D., 532) it was held that where one who files a soldiers' homestead declaratory statement is also the prior settler, he may, at his election, make such settlement the basis of his right to the land by making application for the right of entry under the act of May 14, 1880, or he may permit the time fixed by said statute to expire and then make entry under his declaratory statement. In the former case his right relates back to the date of settlement, and in the latter to the date of filing declaratory statement. In other words, a soldiers' declaratory statement is no protection to a settlement claim, and one who wishes to take advantage of a settlement right must apply to enter, or to contest an intervening entry, within three months from the date of the alleged settlement.

Reeves did not make entry until March 13, 1894, nearly six months after the date of his alleged settlement. His right dates, then, not

from his settlement but from the time of filing his declaratory statement.

The testimony clearly shows that Jared settled upon and began improving the land prior to the date of Reeves' declaratory statement and that he has followed up his settlement by the establishment and maintenance of a residence in good faith.

Your office decision is accordingly affirmed, and Reeves' entry will be canceled. As it appears that Jared's entry has never been formally canceled on the records of your office, said entry will be held intact, subject to compliance with law.

REPAYMENT—RELINQUISHMENT.

FRANCIS E. EASTON.

The fact that the United States has no title to a tract of land embraced within an entry at the date of its allowance and subsequent relinquishment, does not warrant repayment, where the relinquishment is solely due to the entryman's intention to abandon the land, and relinquish all rights under the entry, and not to any knowledge or belief on his part that the entry could not be confirmed.

Secretary Bliss to the Commissioner of the General Land Office, November 11, 1898.

(S. V. P.) (E. F. B.)

This case comes before the Department upon the appeal of Francis E. Easton from the decision of your office rejecting his application for repayment of fees and commissions paid by him on homestead entry made December 9, 1897, for the SE. ¼ of Sec. 31, T. 130 N., R. 47 W., Fargo, North Dakota, which was canceled upon relinquishment June 7, 1881.

From the facts set forth in the decision of your office it appears that the tract in controversy is part of an odd section of land within the six mile limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, lying outside of the limits of the State of Minnesota.

Prior to December 22, 1890, the Department held that said company was not entitled to any lands lying outside of the limits of said State, although within six miles of the line of road as definitely located, and hence entries were allowed of the odd sections of land within said six mile limits, lying outside of the State of Minnesota, in that part of the Territory of Dakota which is now the State of North Dakota, after the right of the railroad company had attached under its grant.

Subsequently the question as to the railroad company's right to the odd sections of land lying within the six mile limits of the line of said road as definitely located and outside of the State of Minnesota, came before the supreme court in the case of St. Paul, Minneapolis and Manitoba Railway Co. *v.* Phelps (137 U. S., 528), and it was held that said grant took effect when definitely located, upon all lands within the prescribed limits, whether in the State of Minnesota or within the limits

of the Territory of Minnesota, as they existed in 1857, which embraced the tract in controversy.

After this decision Congress passed an act for the relief of the settlers upon said lands (27 Stat., 390), which authorized the railroad company to reconvey to the United States all of such odd sections as had been purchased, claimed, occupied and improved prior to January 1, 1891, and to select an equal quantity of land in lieu thereof. It further provided that the right, title and interest to said tracts of land shall revert to the United States as if no right thereto had ever vested in the railroad company, and that all qualified persons who had occupied and made improvements on said lands as therein provided, or who had purchased said land in good faith, their heirs and assigns, shall be permitted to perfect their titles to said lands according to law, as if said grant had never been made.

The company accepted the provisions of said act and reconveyed to the United States all lands coming within the purview of said act, which confirmed to the patentee all lands for which the United States had issued patents.

The entry of Easton for the tract in controversy was voluntarily relinquished by him June 7, 1881, and the next day it was entered by R. H. Deyoe, upon which final certificate and patent issued, and said patent was confirmed by said act of August 5, 1892, above referred to.

In view of the fact that the United States had no title to the land in 1879, the date of the entry by Easton, or in 1881, when he relinquished it, and could not therefore convey the title, he applies for repayment of the fees and commissions paid by him upon said entry, under the second section of the act of June 16, 1880 (21 Stat., 287), which is as follows:

> In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

As the United States had no title to the land when the entry of Easton was made, it is evident that said entry was erroneously allowed, and as the United States could not convey to Easton a title to the land up to the time when he relinquished his entry, it could not be confirmed by the United States, and hence the application may come within the strict letter of the law. But the statute must be construed with reference to the spirit and reason of the law, and can not be invoked to aid in securing benefits that were evidently not contemplated by the statute, even though they come within the strict letter of the act. (Black on Interpretation, Section 29.)

In the case of Holy Trinity Church *v.* United States (143 U. S., 457–8), the court, in construing the "Alien Contract Labor Law," said:

> It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other.

But it was held that the spirit and intention of the act must control against the strict letter:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers . . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

This rule of construction, of general application, applies with greater force in the construction of acts for relief, for the reason that the surest guide to the interpretation of every remedial statute is found in the remedy or relief that the act was intended to effectuate, and to this end it will exclude all cases not coming within the intent and purport of the act and include all cases coming within the spirit, although not within the letter of the statute. That which is not within the relief to be afforded, is not within the statute, even though it be within the letter. (Sutherland on Statutory Construction, Sec. 411.)

The plain and evident purpose of the act was to provide for the repayment of fees and commissions and amount of purchase money paid on entries which were canceled through no fault of the entryman, or at his instance, but solely because the United States could not confirm the title. It was not contemplated that the benefits of the act should be extended to persons whose entries were voluntarily relinquished, not because of the inability of the United States to confirm the title, but because of a plain and manifest purpose on the part of the entryman to abandon the land and to relinquish an entry which he did not desire to complete.

The evil or mischief growing out of the erroneous action of the United States in allowing entry of this land, which it could not confirm, has been remedied by the act of August 5, 1892, confirming the title to the entryman.

When the entry of Easton was allowed, and when his relinquishment was filed, no doubt was entertained as to the right of the United States to confirm the entry. These lands were treated by the Department as public lands of the United States subject to entry, and everyone acted upon this belief. Easton could have perfected his entry and secured a patent for the land, which was afterwards issued to Deyoe upon his entry made the day after the cancellation of Easton's entry upon his voluntary relinquishment. That he did not complete his entry and obtain a patent, was not through any fault of the govern-

ment, but solely because of his intention to abandon the land and voluntarily relinquish all rights under his entry. His action would have been the same if the United States had the full and complete title to the land, because it was not controlled by any knowledge or belief that the entry was erroneously allowed and could not be confirmed. All persons acted upon a belief to the contrary and with such impressions as to the right of the United States to allow these lands to be entered, Easton could have reimbursed himself for his improvements and the expense attending his entry, as doubtless he did, through the sale of his relinquishment. To extend the provisions of the act to such cases would be to confer benefits where no loss had been sustained through the fault of the government and hence no such relief could have been contemplated by the statute.

The decision of your office is affirmed.

INDIAN LANDS—ALLOTMENT—RELINQUISHMENT.

SPALDING ET AL. *v.* KINNEY ET AL. (ON REVIEW).

When an Indian allottee has relinquished his allotment, and his relinquishment has been accepted by the Department, applications to enter the land so released may be received and allowed, upon the Indian surrendering possession and occupancy of the land.

Secretary Bliss to the Commissioner of the General Land Office, September 26, 1898.

(W. V. D.) (G. C. R.)

Clyde E. Kinney and James W. Sanford have filed their joint motion for review of departmental decision of July 8, 1898 (27 L. D., 150), involving the NW. ¼ of the SW. ¼ and the S. ½ of the NW. ¼ and lots 2, 3, 5, 6 and 7, Sec. 28, T. 103 N., R. 72 W., Chamberlain land district, South Dakota.

The Department directed that the entries of Kinney and Sanford (described in said decision) be canceled, and that Frank L. and William C. Spalding be allowed to enter the land, their respective entries of the parts thereof being duly described.

The principal points raised in this motion were considered and passed upon in the decision complained of.

No entries will be allowed upon lands "in the possession, occupation and use of Indian inhabitants or covered by their homes or improvements" (General Land Office Circular 1895, p. 80). When, however, the Indian allottee has relinquished his allotment and his relinquishment has been accepted by the Department, applications to enter the lands may be received, and upon the Indian surrendering the possession and occupancy of the land, in pursuance of his petition, etc., the application to enter may then be accepted.

In the decision complained of it was not intended to hold that lands

in the possession or occupancy of an Indian allottee are subject to entry. But it was then known that the Indian had represented to the Commissioner of Indian Affairs that he was "wholly dissatisfied with his allotment;" that he could speak, read and write the English language: that he had relinquished the allotment and formally and knowingly acknowledged that act before the allotting agent. It is not claimed that the Indian's occupancy was in any manner interfered with.

The Commissioner of Indian Affairs submitted to the Department all the facts connected with the relinquishment, and recommended its acceptance, and the same was, on September 9, 1895, duly accepted. This act of the Department in accepting the Indian's relinquishment had the effect of releasing the land from its former condition, and it became and was from that date public land. By the same order the Indian was given the privilege of taking other lands. The subsequent notation on the records cancelling the allotment was only the carrying out of the judgment of the Department theretofore rendered.

Again, the Indian is not complaining that his occupancy of the allotment was in any manner interfered with by the action of the Department, and so long as there is no complaint from that source, and it appearing that the action of the Department was strictly in accordance with his petition, others have no right to complain.

Upon due consideration of all that is said in the motion and accompanying argument, no sufficient grounds appear for disturbing said decision.

The motion is therefore denied.

PRIVATE CLAIM—SMALL HOLDING—HOMESTEAD.

APODACA ET AL. *v.* MULLIGAN.

Under the provisions of section 8, act of July 22, 1854, a private land claim filed with the surveyor general operates to reserve the land covered thereby from other appropriation until disposed of by direction of Congress, and the repeal of said section by the act of March 3, 1891, does not annul such a reservation in force at the passage of said act.

The right of a "small holding" private land claimant to perfect title under the act of March 3, 1891, is not defeated by a prior homestead entry, where at the time of said entry, and long prior thereto, said claimant was in actual possession under color of title, of which fact the entryman had full knowledge.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *November 19, 1898.* (E. B., Jr.)

Sheldon H. Mulligan has appealed from the decision of your office, dated September 26, 1896, holding for cancellation his homestead entry No. 2379, made June 12, 1885, under which final certificate No. 1395 issued June 16, 1887, for the S. ½ of the SW. ¼ of the W. ½ of the SE. ¼ of Sec. 32, T. 10 N., R. 3 E., Santa Fe, New Mexico, land district, as

to so much of the land embraced therein as is covered by the small holding claims of Francisco Apodaca y Molina, Plutarco Luera and Neill B. Field. Several errors of law and of fact are assigned in the appeal, all of which have been duly considered.

The tracts embraced in these small holding private land claims are within the territory ceded by the Republic of Mexico to the United States by the treaty of Guadalupe Hidalgo concluded February 2, 1848 (9 Stat., 922). Provision for the entry of such claims is made by the seventeenth section of the act of March 3, 1891 (26 Stat., 862), as amended by the act of February 21, 1893 (27 Stat., 470). Your office decision finds that Mulligan knew of the claims of the above named claimants "and that in order to secure patent without objection on their part, he promised to convey to them the tracts claimed by them," and it therefore holds that his entry "as to the NW. ¼ SE. ¼ of said section was not made in good faith, inasmuch as an agreement in contravention of Sec. 2290, U. S. Revised Statutes, has been made by Mr. Mulligan, said section prohibiting any agreement by which the title to a homestead may inure in whole or in part to any other person;" and accordingly reverses the decision of the local office, dated February 20, 1896, favorable to Mulligan, and holds the entry for cancellation to the extent stated above.

The small holding claims of Apodaca, Luera, and Field, Nos. 1261, 1258 and 1256, respectively, were filed March 2, 1893, within the time allowed by the last mentioned act. They aggregate 165.8 acres, but they only conflict with Mulligan's entry as to the NW. ¼ of the SE. ¼ of said section, of which forty acre tract they include all but 3.07 acres. A hearing to determine the rights of the respective parties to the land in conflict was directed by your office, October 19, 1895. Pursuant to such direction a hearing was ordered October 25, 1895, and had in December, January and February, following, all the parties appearing, resulting in the decisions of the local office and your office as above stated. On July 6, 1896, each of the said small holding claimants offered final proof under the seventeenth section of the act of March 3, 1891, *supra*, as amended, which was thereupon, in each case, by the local office "suspended in part for conflict with the Antonio Sandoval or Las Lagunitas grant, and rejected in part for conflict with homestead entry 2379 of Sheldon H. Mulligan." Each of the said claimants appealed from this action. These appeals have not been considered by your office.

A careful examination of the evidence does not, in the opinion of the Department, sustain the conclusion reached by your office that Mulligan entered into an agreement to convey, after patent, part of the land embraced in his entry. Such an agreement, after the submission of final proof, does not vitiate an entry. The conversations between Mulligan and Apodaca and Luera in which it is alleged that Mulligan promised to convey to them the lands claimed by them,

respectively, in consideration of their offering no opposition to his entry, are not shown to have occurred until after Mulligan had received his final certificate. Mulligan denies any such promise at any time, testifying that he only told them that if the land was theirs he did not want it, but if it was government land he wanted it. If there was no other objection to Mulligan's entry save only this alleged agreement, the Department would sustain the entry. But there are objections to his entry, as to the land in controversy, which seriously impugn its validity as against the claims of Apodaca and others.

It appears that the land in controversy is within the limits of a claimed Spanish or Mexican grant to Antonio Sandoval, file No. 207, reported number 154, otherwise known as the Las Lagunitas grant. The records of your office do not show the precise date when the claim on account of the said grant was filed in the office of the surveyor general of New Mexico, but they show that of the four Spanish or Mexican private land claims which were filed in said surveyor general's office during the fiscal year commencing July 1, 1886, and ending June 30, 1887, the Las Lagunitas claim was the third in order of filing, and that the fourth, being file No. 208, claim of Nicholas Duran de Chavez, was filed on April 11, 1887. The Las Lagunitas claim was therefore filed between July 1, 1886, and April 11, 1887, inclusive. In a letter to Mulligan, dated January 5, 1895, the surveyor general of New Mexico states that the claim was filed in that office March 21, 1887, which is probably the correct date.

The claim was never presented to Congress under the eighth section of the act of July 22, 1854 (10 Stat., 308), nor has any petition for its confirmation been filed in the court of private land claims under the act of March 3, 1891, *supra*.

The said township was surveyed in 1881. The lands embraced in the said small holding claims are shown to have been in the actual continuous possession of the claimants thereof and their ancestors, grantors or lawful predecessors in title since long prior to the date of the treaty of Guadalupe-Hidalgo. During all that time the homes of the claimants or their ancestors or predecessors in title have been established thereon and the lands used and occupied by them for general farming purposes. Mulligan settled and established residence July 8, 1885, on land included in his entry and adjacent to that in controversy, and continued to live thereon and improve the same until he made his final proof, but he has never had possession of the land in controversy. At and prior to the entry of Mulligan the land in controversy was all, or nearly all, within the fenced enclosures of the small holding claimants, and he made his entry with knowledge of their claims to the land and of their possession thereof.

In Articles VIII and IX of the treaty of Guadalupe-Hidalgo, *supra*, the United States promised and agreed to protect the property rights of every kind both of resident and non-resident Mexicans. By section

eight of the act of July 22, 1854, *supra*, it was made the duty of the surveyor general of New Mexico, under instructions to be given by the Secretary of the Interior—

to ascertain the origin, nature, character and extent of all claims to land under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the Territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States.

It is further provided in the same section that the reports of the surveyor general—

shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of eigteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

Construing together the provisions of said section eight and of the act of March 3, 1891, relative to the reservation in said section, it was held by the Department in the case of Tumacacori and Calabazas Grant (16 L. D., 408), that (syllabus):

The reservation of land under the provisions of said section is statutory in character, and operates *proprio vigore* upon the land claimed, as soon as claim therefor is made before the surveyor-general, and withholds the same from other appropriation, until disposed of by direction of Congress; and it is not in the power of the executive to change, modify or revoke the reservation thus made.

The act of March 2 (3), 1891, establishing a court for the settlement of private claims, while repealing section 8, of the act of 1851, does not revoke or annul the statutory reservations in force at the time of its passage.

August 5, 1887, the surveyor general of New Mexico reported adversely upon the Antonio Sandoval or Los Lagunitas claim, but this was not a final disposition of the matter, such action under the section last mentioned being then the exclusive prerogative of Congress.

There was no further general legislation looking to the settlement of private land claims until the act of March 3, 1891, *supra*, entitled "An act to establish a court of private land claims, and to provide for the settlement of private land claims in certain States and Territories." By section fifteen of this act section eight of the act of July 22, 1854, is repealed, but the reservation and protection of Spanish-Mexican private land claims theretofore afforded by the said treaty and the said section eight are continued by the act of 1891, special provision being made therein, as hereinbefore noted, for the small holding claims as therein defined and described. The lands embraced in these claims, under the terms of this legislation and the amendatory legislation of February 21, 1893, *supra*, are to be entered without payment or charges of any kind and are precluded from "entry under the land laws of the

United States;" and such claims could not be considered or adjudicated by the private land claims court.

The Las Lagunitas claim, which embraces all of said section 32, within which these small holding claims are situate, is one of the class of Spanish or Mexican claims or grants described in section six of the act of March 3, 1891. No petition in respect thereto having been presented to the court of private land claims within two years from the taking effect of that act, said claim, in the language of the twelfth section of the act, is to "be deemed and taken, in all courts and elsewhere, to be abandoned and shall be forever barred." Said claim has therefore now no standing before the land department or elsewhere. From the date of its filing, in March 1887, in the office of the surveyor general, however, until deemed abandoned and barred as above, it was potential under the treaty of 1848 and act of 1854 to reserve the land embraced therein from adverse appropriation or disposal under the public land laws of the United States (Tumacacori and Calabazas Grant, *supra*). The acceptance, therefore, of final proof by Mulligan for the land in controversy and the issuance to him of final homestead certificate by the local office June 16, 1887, were irregular and unauthorized and can not be set up to defeat the claims of the small holding claimants. Unless by reason of his entry and subsequent settlement, residence and improvements on the adjacent land his right to the land involved is superior to the rights of the small holding claimants his claim must yield to theirs. They were in actual possession of the land under color of title when Mulligan made his entry, June 12, 1885, and have so continued ever since. He knew the land was claimed and held as private property and not as government land when he attempted to enter it.

The history of the act of 1891, and the terms of the act itself, which was the successful culmination of frequent attempts since the act of 1854 at legislation looking to the final settlement of private land claims in the territory derived from the Republic of Mexico, show that the homes and lands of small holding claimants, to which class these seem to belong whose lands are included in Mulligan's entry, were the objects of the special solicitude of Congress, and that it was the intention by the passage of the latter act to afford them full protection, and provide a simple and easy means by which they could secure and perfect their titles against all possibility of successful claim under the public land laws of the United States, as well as against danger to them by reason of failure of confirmation of the alleged Spanish or Mexican grants within which their claims were situated. It is believed that the laws and decisions applicable to the facts in this case should be liberally construed and applied in behalf of these small holding claimants, and that, on the other hand, they should be strictly construed and applied against Mulligan in his attempt to wrest from these claimants the lands and homes which they and their ancestors or predecessors in title had possessed and enjoyed undisturbed for more than half a century.

The doctrine announced by the supreme court in the case of Atherton *v.* Fowler (96 U. S., 513) and approved and followed in the cases of Hosmer *v.* Wallace (97 U. S., 57) and Trenouth *v.* San Francisco (100 U. S., 251), seems, therefore, especially appropriate for application to the present case. In Atherton *v.* Fowler, *supra*, the plaintiff was in possession of land in California under color of title from parties claiming under an alleged (the Vallejo) grant, which failed of confirmation. While so in possession, and after failure of confirmation, the land was forcibly entered upon by the defendant and others who dispossessed the plaintiff, occupied, built on and cultivated parts of the land "under pretense," the court found, "of establishing a pre-emption right" in themselves thereto. In its decision the court said, among other things:

> Among the things which the law required of a pre-emptor, and the principal things required of him to secure his right, were: 1. To make a settlement on the land in person. 2. To inhabit and improve the same. 3. To erect a dwelling-house thereon. Sect. 2259, Rev. Stat.
>
> At the moment the land . . . . became liable to pre-emption, the whole of it was, by the various persons claiming under Vallejo, 1, settled on by them in person; 2, inhabited and improved by them; and, 3, it had dwellings erected on it by them.
>
> Unless some reason is shown, not found in this record, these were the persons entitled to make pre-emption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.

After further discussion, the court in conclusion said:

> It follows that the defendants could not have made any lawful entry on the lands . . . . in this case; that no law existed which gave them any right to make such an entry; that they were mere naked trespassers, making an unwarranted intrusion upon the enclosure of another,—an enclosure and occupation of years, upon which time and labor and money had been expended,—and that in such a wrongful attempt to seize the fruits of other men's labor there could be no *bona fide* claim of right whatever. The instruction of the court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous, and the judgment founded on it must be reversed.

In Hosmer *v.* Wallace, *supra*, the land in controversy was part of a Mexican grant but had been excluded, in June, 1865, from the approved survey of the same in accordance with the terms of previous confirmation. The claimant under the grant, however, continued in possession and subsequently claimed the right to purchase under section 7 of the

act of July 23, 1866 (14 Stat., 220). The plaintiff claimed the land by virtue of settlement in 1856, subsequent residence and improvements, and entry in September, 1866, under the pre-emption laws. It does not appear that the claimant under the grant had enclosed the land, nor that forcible entry thereon was made by the plaintiff. The court, in its decision, cited Atherton *v.* Fowler approvingly, and held in favor of the defendant. It was declared (syllabus) that—

> The right of pre-emption only inures in favor of a claimant when he has performed the conditions of actual settlement, inhabitation, and improvement. As he can not perform them when the land is occupied by another, his right of pre-emption does not extend to it.

In the course of the decision the court said:

> To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor, conditions which can not be met when the land is in the occupation of another. Settlement, inhabitation, and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it prove to be part of the same sectional subdivision. Under the pre-emption laws, as held in Atherton *v.* Fowler (96 U. S., 513), the right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling-house is to be exercised on vacant land: none of these things can be done on land when it is occupied and used by others.
>
> There was, therefore, no valid adverse right or title, except that of the United States, to the premises in controversy when they were excluded by the approved survey from the tract confirmed; nor had the plaintiff the right of a pre-emption claimant to them. No just ground, consequently, existed for refusing to the defendant the privilege of purchasing them under the act of 1866. It is found by the court that he bought the land, in good faith and for a valuable consideration, from the assignees of the Mexican grantee before the survey of the grant; and that it has since been in his actual possession and use, according to the lines of his original purchase.

The principle in these cases was re-affirmed in Trenouth *v.* San Francisco, *supra*, wherein it was held that "the right of pre-emption, under the laws of the United States, can not be acquired by intrusion and trespass upon the actual possession of others." See also the cases of Brown *v.* Quinlan *et al.* (10 C. L. O., 7; on review, Id., 105) and Coleman *v.* Collins *et al.* (10 C. L. O., 199), which were decided by the Department in obedience to the same principle.

In all of these cases the parties who were held to be unlawful intruders upon the possession of others claimed, it is true, under the pre-emption law, instead of the homestead law, under which Mulligan claims. There is no material difference between the provisions of the pre-emption law applicable to the facts in the cases cited, and the provisions of the homestead law applicable to the case at bar, so far as the question now under discussion is concerned; so that the doctrine of the cases cited applies as fully to the case at bar as if Mulligan were claiming under the pre-emption law. His entry, residence and improvements upon the land he claims gave him no right to the land

in the possession of the small holding claimants who were, for the time being, at least, lawfully in possession under color of title.

His entry, as to the land in controversy, will be held subject to the final disposition of the claims of the small holding claimants. Upon the perfecting of these claims, or any one of them, his entry, to that extent, will be canceled. As thus modified the decision of your office is affirmed.

AMENDMENT OF ENTRY—ADVERSE CLAIM—RELINQUISHMENT.

STIMSON *v.* SQUIRE.

An entryman who discovers that his entry does not correspond with his application but makes no effort toward the correction of such mistake, and permits another without objection, or notice of any claim on his part, to go upon and improve the tract omitted from his entry, will not thereafter be heard to assert any right under his original application as against such adverse claimant.

The administrator of the estate of a deceased homesteader is without authority under the homestead laws to relinquish the entry of the decedent.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *November 19, 1898.* (G. R. O.)

The record in this case shows the facts to be as follows:

On June 6, 1888, Samuel Squire presented at the local land office at Spokane, Washington, the relinquishment of the homestead entry of D. S. Henry, covering lots 1, 2, and 3, and the NE. ¼ of the SW. ¼ of Sec. 18, T. 26 N., R. 35 E. Henry's entry was thereupon canceled and Squire at once filed his own homestead application for lots 2 and 3, the NE. ¼ of the SW. ¼ and the SE. ¼ of the NW. ¼ of the same section. In describing the land in duplicate receipt the receiver omitted the SE. ¼ of the NW. ¼, and wrote instead lot 1, and this error was followed when record of the entry was made on the tract book, so that the records of the local office and the receiver's duplicate receipt issued to Squire each showed that the land which had been entered by him was lots 1, 2 and 3 and the NE. ¼ of the SW. ¼ of Sec. 18, instead of lots 2 and 3, the NE. ¼ of the SW. ¼ and the SE. ¼ of the NW. ¼ of said section.

So far as the records of the local office showed, the SE. ¼ of the NW. ¼, the land here in controversy, was left vacant, and on June 6, 1889, Sarah E. Alfrey was allowed to make homestead entry of the E. ½ of the NW. ¼ and the N. ½ of the NE. ¼ of the section, thus including the land in controversy.

On March 16, 1895, Squire gave notice of intention to submit final proof in support of his entry of lots 1, 2 and 3 and the NE. ¼ of the SW. ¼ of the section, and such proof was submitted on May 11, 1895, and was approved by the local officers. When it was considered by your office, however, it was found that the description of the land for

which such proof had been made did not agree with that in the original homestead application, and the local officers were instructed, on November 19, 1895, to notify the entryman that if he originally intended to enter the land described in his application he would be required to re-advertise and submit new proof, correctly describing the land, or, if he originally intended to enter the land described in his final papers, he should make application to amend. Squire was duly notified, and on December 7, 1895, he filed an affidavit, alleging that he desired to obtain title to the land described in his original application. By letter of April 22, 1896, your office advised the local officers that it would be necessary for Squire to submit new proof covering the land he desired to enter. Accordingly, Squire, on September 3, 1896, after giving notice, appeared at your office and submitted such proof.

At the same time, Willard Stimson appeared and filed a protest against the allowance of said proof, alleging that the above-mentioned Sarah E. Alfrey had settled upon the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ within six months after making her entry, and had made improvements upon said tract; that she had died in the fall of 1889, and in the fall of 1890 he had purchased such improvements and all her interest in the land included in her entry, from George W. Dyer, the administrator of her estate; that in June, 1891, said administrator had executed a relinquishment of all her rights and interest in said land; that the affiant had settled upon said land prior to the date of his purchase, and had resided upon, improved and cultivated the tract in controversy ever since, and had improvements upon it of the value of $500.00; that on July 8, 1892, his son, George L. Stimson, had filed said relinquishment in the local land office, together with his application to enter the land, but the local officers refused to accept the relinquishment because it was not accompanied by evidence that the party executing it had been appointed administrator of Mrs. Alfrey's estate. He alleged also that Squire had always claimed lots 1, 2 and 3 and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, as his homestead, and had never made any claim whatever to the tract in controversy until after his first final proof had been made, but had permitted Stimson to live upon and improve the said land without protest or objection; and that Squire had no improvements on said tract, but all of his improvements were upon lots 1, 2 and 3.

On July 27, 1896, James H. Stimson filed with the local officers the relinquishment of Mrs. Alfrey's entry, executed by the administrator of her estate, together with proof of the appointment of such administrator. At the same time he presented homestead application for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the section. The local officers accepted the relinquishment and canceled Mrs. Alfrey's entry, but rejected Stimson's application, for the reason that it conflicted, as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, with the application of Samuel Squire to amend his homestead entry.

Hearing was had upon Stimson's protest, and on November 18, 1896,

the local officers rendered a decision, holding "That the final entry of Samuel Squire as to the SE. ¼ of the NW. ¼ of Sec. 18, Tp. 26 N., R. 35 E., W. M., should not be allowed, and that the application of Willard Stimson should be allowed." On appeal your office reversed this decision, using this language:

> I do not concur in your conclusion that Squire's entry should be canceled as to the SE. ¼ of NW. ¼, and Stimson be allowed to enter. His entry gave notice of his claim and intention to secure the land embraced therein. He was not required to cultivate every legal subdivision embraced in his entry. His residence, cultivation and improvement upon some of the legal subdivisions sufficed as to all. Alfrey's entry being subsequent to Squire's, was erroneously allowed as to the SE. ¼ NW. ¼, and he and others gained no right thereto by settling upon and improving the same.
>
> Squire appears to have complied with the law and earned patent to the land embraced in his original entry, but has not complied with the requirements of the law as to lot 1 of Sec. 18. His F. C. No. 4531 is hereby canceled as to lot 1.
>
> The original entry of Squire remains intact as to lots 2, 3 and NE. ¼ of SW. ¼, and also as to said SE. ¼ of NW. ¼.

Stimson's appeal from your said decision now brings the case before this Department.

Your office is in error in speaking of the application of Squire to enter the SE. ¼ of NW. ¼, as an "entry" of that tract. A mere application to enter is not an entry. It is the preliminary step necessary to an entry, but the entry is not made until the local officers have approved the application and entered it upon their records. In the case now being discussed Squire applied to enter the SE. ¼ of NW. ¼, and, through an error, his entry was made for lot 1, instead of the tract applied for. He states that he discovered the mistake in the winter of 1888–9, and he could then have had the error corrected, if he had so desired. He made no effort to have the record changed, however, until after he had submitted final proof covering said lot 1, and he appears to have been satisfied to accept this tract instead of the other. Your statement, that he has "complied with the law and earned patent to the land embraced in his original entry (application) but has not complied with the requirements of the law as to lot 1 of Sec. 18," is incorrect. He, himself, swears that he has had lot 1 enclosed and under cultivation for a number of years, and that he has never made any improvements upon the SE. ¼ of NW. ¼, except that part of a corral which he built upon lot 2 extends onto this tract. He allowed, first Mrs. Alfrey, and then Stimson, to go upon this tract and make valuable improvements upon it, without giving them any notice that he claimed it, or offering any objection to their occupying it. Under these circumstances, any rights which he may once have had to the tract in controversy, by virtue of his homestead application, he has long since lost by his failure to reassert them in due time after discovering the mistake.

Stimson seems to have acted in good faith. The land was not occupied by Squire and the records of the local office disclosed no claim to it except that of Mrs. Alfrey, which Stimson claims to have purchased. He and his sons have lived upon the tract ever since his alleged pur-

chase of Mrs. Alfrey's right to it in 1890, and have made improvements upon it of the value of $500. The local officers appear to have canceled Mrs. Alfrey's entry on the relinquishment presented in July, 1896. Under the circumstances, as between Stimson and Squire, the land in controversy must be held subject to the former's right to enter in the event it shall be found that there are no heirs of the decedent, Mrs. Alfrey, entitled thereto, upon proper proceedings instituted for that purpose as hereinafter suggested, and Squire's last final proof must be rejected. If he makes proper application to amend his original application so as to conform to his first final proof, such amendment may be allowed and the proof accepted.

In your said decision you found that the relinquishment of Mrs. Alfrey's entry was not accompanied by evidence that the administrator had authority from the probate court to make such relinquishment, and you held that the entry would stand intact unless such evidence was filed within thirty days.

The administrator of a deceased entryman is without authority under the homestead laws to relinquish the entry of the decedent, whether authorized so to do by the local probate courts or not. Under the federal statute the rights of a deceased entryman descend or go to his widow, heirs, or devisees, and there is no provision in the law that the administrator may exercise any right or powers in the premises. In the present case it does not appear that the deceased entrywoman may not have heirs or devisees, and even if it did so appear there would still be no right of relinquishment in the administrator. Before Stimson can make entry of the land covered by Mrs. Alfrey's entry, which has never been properly canceled, he will have to contest the entry in the regular way, with notice to the heirs of Mrs. Alfrey, if any. If he shall successfully do this you will cancel the entry and allow him to make entry for the land.

Your decision is accordingly modified.

TOWNSITE PROCEEDINGS—ASSESSMENT.

E. B. MENTZ.

The authority of the townsite board to levy assessments is limited to matters necessarily attendant upon the execution of the trust growing out of the allowance of the entry, and does not extend to expenses incurred by the townsite applicants prior thereto in securing the right of entry as against adverse claimants.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *November 19, 1898.* (G. B. G.)

E. B. Mentz has appealed from the decision of your office of July 6, 1898, whereby his request was denied that townsite board No. 6 be instructed to levy an assessment on the townsite of Northeast Perry, Oklahoma, to pay attorney's fees alleged to be due him upon a contract

with certain townsite occupants for services in a contest case, involving their rights, as against one John J. Malone, a homestead claimant for the same land.

It was stated by Mr. Mentz, in a letter upon which the aforesaid action of your office was had, that he was employed under a contract with the townsite trustees to conduct the case on the part of the townsite settlers, for a fee of $312, contingent on the successful prosecution thereof; that he conducted the case throughout and to a successful termination, besides contributing some fifteen dollars to the expenses of the litigation; that he knows of no way whereby his fee can be collected, unless the townsite board be directed to make an assessment and collect the same as assessments are made and collected for other expenses, and that he "was advised to this course by members of townsite board No. 6."

The contention on appeal is, that fees for attorneys necessarily employed by parties duly authorized thereto by the occupants of a townsite, for the purpose of prosecuting or defending a townsite claim, are within the terms of the law and regulations governing assessments for expenses on town lots.

The statement of Mr. Mentz, that he was "employed under a contract with the townsite trustees to conduct the case," is misleading. His employment was by a committee or board of trustees representing the occupants, but he was not employed by any officer or officers of the government.

Section 1 of the act of May 14, 1890 (26 Stat., 109), entitled "An act to provide for townsite entries of lands in what is known as 'Oklahoma,' and for other purposes," under which the townsite entry of Northeast Perry was made, provides, among other things, that

> When such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots, when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such townsite costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees.

Paragraph 11 of the regulations of November 30, 1894 (19 L. D., 337), provided by the Department for "the guidance of trustees in the execution of their trust" under said act, is in the matter of assessments substantially the same, in general terms, as the act itself, but it is further provided that in making these assessments said townsite trustees "will take into consideration:"

> First. The ten thousand dollars ($10,000) appropriated by said act of May 14, 1890, and such further sum as may be appropriated by Congress, before said assessment is made, for the purpose of carrying into effect the terms of said act, which is to be refunded to the Treasury of the United States; but, of course, only so much thereof as it will be necessary to use.
>
> Second. The money expended for entering the land.
>
> Third. The costs of survey and plotting the townsite.

Fourth. The expenses incident to making the conveyances.
Fifth. The compensation of yourselves as trustees.
Sixth. The compensation of your clerk.
Seventh. The necessary travelling expenses of yourselves and clerk.
Eighth. All necessary expenses incident to the expeditious execution of your trust.

No authority is found in the act (*supra*), nor in the regulations quoted, to authorize an assessment against town lots for the payment of attorneys' fees.

The act provides generally that the Secretary of the Interior shall make regulations for the proper execution of the trust. But "proper execution" is defined and limited in the matter of assessments to "pay for the lands, cost of survey, conveyance of lots, and other necessary expenses, including compensation of trustees."

If the assessment now asked for finds any justification in this statute, it must come under the head of "other necessary expenses," and it cannot with reason be held that attorneys' fees for services performed before the townsite entry was made are expenses necessary or otherwise for the proper execution of the trust.

The regulations are even more specific than the act, and by including what may be taken into consideration in making assessments thereby exclude attorneys' fees, which are not mentioned, unless found in the eighth subdivision above quoted, and it surely can not be well said that attorneys' fees are "expenses incident to the expeditious execution" of the trust.

The authority of the townsite board to levy assessments is limited to matters necessarily attendant upon the execution of the trust growing out of the allowance of the entry, and does not extend to expenses incurred by the townsite applicants prior thereto in securing the right of entry as against adverse claimants.

The decision appealed from is affirmed.

REPAYMENT—ENTRY CANCELED FOR CONFLICT.

NILS N. YDSTI.

Where the local office recommends the cancellation of an entry on a contest involving priority of right, and the entryman thereupon applies for repayment, accompanying his application with a relinquishment, his entry may be treated as "canceled for conflict," within the meaning of the statute, if the recommendation of the local office is subsequently approved.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *November 19, 1898.* (C. J. G.)

Nils N. Ydsti has appealed from you office decision of May 22, 1897, denying his application for repayment of the fees and commissions paid by him on homestead entry covering the SE. ¼ of the NW. ¼ and lots 3, 4, 5, Sec. 6, T. 150 N., R. 39 W., Crookston land district, Minnesota.

The ground for the denial of the application is, that the entry was

not erroneously allowed or canceled for conflict but was cancelled because of the voluntary relinquishment of the entryman.

The applicant files with his appeal a copy of a decision by the local officers in the case of Gustav Gilbertson and John Kearney against him, from which it appears that Ydsti's homestead entry was made May 16, 1896; that May 26, 1896, and July 1, 1896, respectively, Gilbertson and Kearney filed separate affidavits of contest against said entry, alleging prior settlement; and that August 12, 1896, a hearing was had in which the parties participated. The local officers rendered decision finding Kearney to be the prior settler and recommended cancellation of Ydsti's entry.

Ydsti did not appeal from this decision but acquiesced therein by making application for repayment of fees and commissions paid by him, accompanying such application by a surrender and return of the receiver's duplicate receipt and by a relinquishment of his right, title and claim to the land embraced in his entry, which relinquishment states that it was made "solely in consequence of the cancellation of said entry." It seems that the decision of the local officers in the contest case was not transmitted to your office but the application for repayment and accompanying papers were so transmitted, and your office, overlooking the fact that the relinquishment was made only in compliance with the statute relating to repayments and as a part of the application for repayment, mistook it for an independent and voluntary relinquishment and canceled the entry accordingly.

It thus happens that Ydsti's entry was canceled and his application for repayment denied without the true facts of his case ever being considered. Your office will send for and take appropriate action upon the record and decision of the local officers in the contest case against Ydsti's homestead entry, and if the recommendation of the local officers is approved the entry will be noted as canceled for conflict with the prior settlement claim and Ydsti's application for repayment will then be again considered by your office and disposed of according to its merits.

SALE OF ISOLATED TRACT—PUBLICATION OF NOTICE.

ALBERT A. PRENZLAUER.

The act of February 26, 1895, amending section 2455, R. S., with respect to the sale of isolated tracts, requires "at least thirty days notice" prior to such sale, and the publication of such notice for five successive weeks in a weekly newspaper is due compliance with said statutory requirement, and the regulations thereunder, where the sale takes place thirty days after the first publication.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *November 19, 1898.* (G. B. G.)

Albert Prenzlauer has appealed from your office decision of April 9, 1898, holding for cancellation cash certificate No. 19,076, issued Novem-

ber 2, 1897, to him as the purchaser of an island designated as lot 2, Sec. 17, T. 41 N., R. 5 E., Marquette, Michigan, containing 16.20 acres.

The sale under which this certificate issued was made pursuant to section 2455 of the Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687).

By your office letter of January 21, 1898, Prenzlauer was called upon to show cause why the certificate should not be canceled, "it appearing from the affidavit of the publisher that the notice of the offering of said island had only been published in five successive issues of a weekly paper, instead of six as required."

In the decision appealed from, after stating that the notice was published in a weekly paper, the first insertion being in the issue of September 30, 1897, and the fifth and last insertion being in the issue of October 28, 1897, it is said:

> The law requires such notice to be published for thirty days, and when it is given by publication in a weekly paper, the departmental requirement is, that it appear for six successive weeks, and this office is not authorized to accept less.

Section 2455 of the Revised Statutes, as amended by the act of February 26, 1895 (*supra*), is as follows:

> It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected for a period of three years after the surrounding land has been entered, filed upon, or sold by the Government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

The requirement of this statute respecting notice is that the land can be exposed to sale only "after at least thirty days' notice." Your office decision suggests that under a "departmental requirement" such notice must be published "for six successive weeks," where given in a weekly paper, but no such departmental requirement is pointed out or cited by the decision.

From informal inquiry at your office, it is ascertained that this suggestion is based upon paragraph 6, page 77, General Land Office Circular of 1895, regulating publication of notices of intention to make final proof, but the notice required by section 2455, as amended, is not a notice of final proof and, indeed, no such thing as final proof is required under this statute, so the regulation cited is not applicable.

In the same General Land Office Circular, at page 5, it is directed, in reference to sales under this statute, that notice "be published once a week for the space of thirty days in a newspaper of general circulation in the vicinity of the land," and that "the day of sale must be fixed so as to take place at least thirty days after the date of the first publication of the notice." This constitutes the only regulation on the subject.

It is thus seen that neither the statute by which such sales are authorized, nor the regulation issued to facilitate its administration, requires that publication shall be "for six successive weeks," when made in a weekly paper. In this case the notice appeared in the regular issues of the paper on September 30, October 7, 14, 21 and 28, and the sale occurred November 2nd. The publication of the notice was not limited to the days of its insertion in the weekly newspaper. Each insertion was a publication not merely for that day, but also for the period intervening before the next regular issue of the paper, and so the insertion of the notice in the issue of October 28, was a living and continuing publication thereof until the time of the sale, November 2, which preceded the next regular issue of the paper. Thus the notice was published once a week for the space of thirty days, the sale took place at least thirty days after the date of the first publication, and the continuity of the notice was maintained by its publication in each issue of the paper during this period. This constitutes "at least thirty days' notice" within the meaning of the statute and also fully complies with the regulation issued thereunder.

The decision appealed from is reversed and the case is remanded for further proceedings consistent with this decision.

JUDGMENT—CANCELLATION—APPLICATION.

KNOBLE *v.* ORR.

On failure to appeal, after due notice of a decision of the General Land Office holding an entry for cancellation, the judgment becomes final, and the land is thereafter open to entry by the first legal applicant.

The rights of an applicant under a pending application should be protected as against intervening adverse claims, where the delay in perfecting entry is not due to any negligence on the part of the applicant.

In the case of a valid application to enter that has been held for a long period without action, the local office should give the applicant at least thirty days notice in calling upon him to appear and exercise his right of entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *November 19, 1898.* (E. B., Jr.)

This is an appeal by Charles F. Knoble from your office decision of February 18, 1897, affirming the rejection by the local office of his homestead application offered for filing June 20, 1893, for the SW. ¼ of the SW. ¼ of Sec. 10, T. 27 S., R. 25 E., M. D. M., Visalia, California, land district.

It appears that the tract above described was embraced in a soldier's additional homestead entry, made November 15, 1875, by John Garris. The entry was held by your office for cancellation August 26, 1890, but for some reason not apparent from the papers transmitted was not canceled of record until November 2, 1896. Knoble's application was

received when offered, but held pending final disposition of the said entry.

November 12, 1896, Alfred R. Orr offered for filing his application to make additional homestead entry of the said tract, as assignee of a soldier's right of additional entry under section 2306 of the Revised Statutes, which application was on the same date "rejected because of the prior valid homestead application of Charles F. Knoble." November 16, 1896, the local office rescinded the rejecting of Orr's application, and held it subject to the application of Knoble. The day following, a motion by Orr for the rejection of Knoble's application and the allowance of entry by him (Orr), was denied; and on the same day the local office sent notice by registered mail to Knoble "to appear . . . and exercise his right" of entry within ten days. This notice Knoble received two days later, November 19. No response having been made by him, the local office, December 17, 1896, rejected his application "because the applicant failed to appear and exercise his rights under said application, if any he had, after due notice to do so," and the same day allowed Orr to enter the land. Upon appeal by Knoble your office affirmed the rejection of his application on the ground that he acquired no right to the land by virtue of offering his application while Garris' entry was still in existence.

Garris' entry was no bar to the filing of the application of Knoble. Due notice of the judgment of cancellation of the entry was given, as appears from the report of the local office, dated August 10, 1891, but Garris made no response thereto. Such judgment had therefore become final and the land open to entry by the first qualified applicant long prior to the filing of Knoble's application (Guillory *v.* Buller, 24 L. D., 269). His application must therefore be regarded as duly filed upon the date he offered it with the proper fees and commissions, that is, June 20, 1893. That he did not perfect his application and make entry of the land prior to November 19, 1896, when he received the notice to do so, was not due to any laches on his part, but was wholly chargeable to the action of the local office. Orr gained nothing as against Knoble by the offering of his application November 12, 1896. The prior application of Knoble reserved the land. Orr's application was properly rejected when offered, and that action should have been adhered to. Knoble's appeal in apt time from the rejection of his application saved all rights he had thereunder. His application was therefore still pending when Orr's entry was allowed. It was error to allow such entry and Orr gained nothing thereby. This brings us to the controlling question in the case, which is whether by reason of the notice given him Knoble's failure to appear and pay the proper fees and commissions amounted to such laches as to justify the rejection of his application. Neither the notice nor a copy thereof is in the record. It is admitted however that its substance was as above stated. It did not advise Knoble that he would incur any penalty in case he failed

to respond within the time mentioned. In his affidavit filed with his appeal from the action of the local office he states that he did not have the eight dollars with which to make the necessary payment when he received the notice, that he tried to borrow that amount but by reason of his poverty was unable to procure it until December 17, 1896, upon which date he went to the local office, tendered the required sum and asked to be allowed to make entry. Your office decision admits that Knoble appeared and made tender as he alleges. The Department is unable to find any rule governing this case. In the case of a successful contestant against a homestead entry the law requires that thirty days from notice of cancellation of the entry shall be allowed him within which to enter the land. The status of Knoble in this case on November 17, 1896, when the local office mailed him the said notice, was somewhat analogous to that of a successful contestant. He should have been allowed the same length of time within which to appear and complete his application. He did appear and tendered payment within thirty days from notice. Orr was evidently pressing for the allowance of entry, but that was no sufficient reason for summary action upon Knoble's application. Orr had no standing as an applicant for the land.

It is to be remembered that but for the erroneous action of the local office in rejecting his application Knoble would have entered the land June 20, 1893, and this controversy have been avoided. The Department upon careful consideration is convinced that Knoble has the better right to the land and so holds. The decision of your office is accordingly reversed. Orr's entry will be held subject to the right of Knoble to perfect his application within thirty days from notice. Upon compliance herewith by Knoble, Orr's entry will be canceled.

SETTLEMENT RIGHTS—APPLICATION TO ENTER—ESTOPPEL.

COLLIGAN *v.* DAIGLE.

The right of an actual settler on a tract of land embraced within a railroad indemnity selection, who applies to enter, accompanying his application with an affidavit of contest against the railroad selection, and thereafter dies before any action is taken on his application or contest, descends to his heirs, and may be perfected by them on the elimination of the indemnity selection.

One who fails to assert a settlement claim to land in the adverse possession of another, or object to such adverse occupancy, and permits such occupant to make valuable improvements on the land so held, is estopped from thereafter setting up any priority of right on his part as against said occupant.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *November 21, 1898.* (C. J. W.)

January 26, 1893, Auguste Daigle applied to make homestead entry for lots 3, 4, 5 and 6, or fractional SW. ¼ of Sec. 23, T. 7 S., R. 2 E., New Orleans land district, Louisiana, presenting at the same time the

relinquishment of the New Orleans Pacific Railroad Company, which claimed the land by virtue of assignment from the Baton Rouge and Vicksburg Railroad Company, which assignment was confirmed by the act of February 8, 1887 (24 Stat., 391), as to the part of the grant which embraces the land in question.

On March 13, 1893, Daigle submitted final proof, and on April 4, 1893, final certificate issued to him.

September 30, 1893, Julia Colligan, widow of Ernest Colligan, presented a homestead application for the same land, which was rejected for conflict with Daigle's entry, from which rejection she appealed, and filed affidavit of contest against Daigle's entry, alleging it was made without her knowledge and in violation of the rights of her deceased husband.

On October 12, 1894, your office rejected Mrs. Colligan's application to enter and denied her application to contest, and she appealed.

Your office decision was affirmed by the Department January 25, 1896.

On August 28, 1896, on review, the Department set aside its decision of January 25, 1896, reversed your office decision of October 12, 1894, and directed that a hearing be ordered.

In pursuance of instructions, a hearing was had and testimony was submitted by the parties before a United States commissioner at Opelousas, Louisiana, and returned to the local office at New Orleans, upon which testimony, on March 10, 1897, the local officers rendered a decision in favor of Daigle and dismissed the contest. Mrs. Colligan appealed to your office, and on February 12, 1898, your office affirmed the decision.

The case is before the Department on the further appeal of Mrs. Colligan.

In order to understand the merits of the controversy between the present parties, it is necessary to state the facts which led up to it.

It is conceded that the land is within the indemnity limits of the grant made by the act of March 3, 1871 (16 Stat. 573), to the New Orleans, Baton Rouge and Vicksburg Railroad Company, and that its rights were assigned to the New Orleans Pacific Railway Company, which company, it appears, definitely located that part of the line of its road which is opposite the land in dispute, November 17, 1882, and selected it December 28, 1883. It further appears that on April 27, 1887, one Leon Le Bleu made application to enter said land under the homestead law, but subsequently amended his application by substituting for lots 3, 4, 5 and 6, the N. ½ of the NE. ¼.

On August 17, 1889, Ernest Colligan, husband of Julia, applied to enter these lots under the homestead laws, which was rejected.

On April 15, 1890, Ernest Colligan presented another application for said land, alleging settlement thereon January 10, 1890, upon which no action seems to have been taken, but which was still pending at the death of Colligan, which occurred November 6, 1892.

It appears that your office, on March 18, 1890, allowed Le Bleu to change his application to the N. ½ of the NE. ¼, and his application thereafter ceased to apply to the lands in question.

It appears further from the decision of the local officers that Colligan's application of April 15, 1890, was accompanied by an affidavit of contest against the New Orleans Pacific Railroad Company. They find also that Daigle had no contest against the company, but that it relinquished its claim in his behalf, and he was permitted to make entry, without giving any opportunity to Colligan to show his right.

The local officers seem to have proceeded upon the idea that the claim of Daigle was in some way strengthened by the relinquishment of the railroad company, although its relinquishment was to the United States. The effect of its relinquishment was to restore the land to the public domain, free from the grant to the railroad company; and it would seem, under the facts as hereinafter shown, that as between Daigle and Colligan the latter was entitled to have his application duly considered before Daigle's entry was allowed.

The question arises as to whether the right to perfect entry survived to Colligan's heirs, he having in the meantime died.

It is believed that the principle decided in the case of Wilka's Heirs *v.* Martin *et al.* (22 L. D., 300,) is applicable to this case, wherein it was held (syllabus):

> The right of an actual settler, with a pending application, to make homestead entry, who dies before the final determination of a contest instituted by him against a prior adverse entry, descends to his heirs, and may be perfected by them on the cancellation of the entry under attack; and this right is in no manner dependent upon the provisions of the act of July 26, 1892, with respect to the heirs of a contestant.

If this right survived to Colligan's heirs, it was error to allow Daigle's entry without notice to them.

Regarding Mrs. Colligan as the representative of the heirs of her deceased husband, they being minors, the case is to be considered on its merits, as though it was proceeding between Colligan and Daigle. The contention of Mrs. Colligan is that Daigle was estopped from claiming anything by virtue of his residence on the land as against the settlement rights of her deceased husband, and that he is also estopped as to the claim of herself and children, they being privies in estate of Ernest Colligan.

It appears from the evidence that Daigle has for many years occupied a small cabin on the tract, but near the line, and that his improvements are of small value.

It appears from the record that the improvements of Colligan are worth not less than five hundred dollars; that Daigle assisted him in making the improvements; that fifty acres are enclosed and twenty in cultivation; and that Colligan's family have resided upon and cultivated the land since 1890 up to the hearing, and that Daigle never questioned their right during Colligan's lifetime. It seems probable

that Daigle first claimed his settlement to be upon adjoining land, afterwards entered by William Clavier.

William S. Evins, who resides in the neighborhood of the land and who assisted Colligan in trying to make entry, testifies, when asked if Colligan settled with consent and aid of Daigle:

> Ans. Daigle made no opposition at all, when I was engaged in trying to enter the land for Ernest Colligan, deceased, nor while I was engaged in entering the land for contestant. Daigle told me he was to receive forty arpents of NW. ¼ of same section from William Clavier, who had made application therefor, Daigle claiming to be at that time on the NW. ¼. He was promised the forty arpents by William Clavier for keeping silent and not opposing him for his entry NW. ¼.

Daigle, though present at the hearing, did not go upon the stand or otherwise dispute this testimony.

William Clavier was put upon the stand, but he was asked no question in reference to the arrangement between him and Daigle, and did not deny it. It must therefore be taken as true.

Hebard Daigle testified that he and Auguste Daigle assisted Colligan, when he first settled, to build his house and enclose the land, and that he never heard Auguste Daigle make any objection during the lifetime of Colligan, and that the improvements are not worth less than five hundred dollars.

There is no denial of these facts. Daigle, therefore, kept silent and saw Colligan put valuable improvements on the land, which are to inure to his benefit if his entry stands. While the record does not show any specific agreement between the parties, the fact that Daigle aided and assisted Colligan in making the improvements, without making known his intention to make entry, is strongly suggestive that he then had no such intention. If he had, it was fraud to conceal it, and if it arose later, he would be estopped from acting upon it as against Colligan and his heirs. Colligan had a right to suppose that Daigle did not intend to apply for the land.

The doctrine of estoppel *in pais* "Proceeds upon the ground that he who has been silent as to his alleged right when he ought in good faith to have spoken shall not be heard to speak when he ought to be silent." Morgan *v.* Railroad Company (96 U. S., 716).

In the case of Roberts *et al. v.* Gordon, 14 L. D., 475, it was held (syllabus) that:

> One who fails to assert any claim to a tract of public land which is in the adverse possession of another, and remains silent, though knowing that the adverse occupant continues to claim, occupy and improve the land, is estopped thereby from subsequently denying the good faith of said occupant and asserting a right of priority in himself.

Your office decision is accordingly reversed, and the homestead entry of Daigle held subject to the right of contestant to enter said land for the use of the heirs of Ernest Colligan, deceased, within thirty days from notice of this decision.

RECORDS—EXAMINATION BY THE PUBLIC.

INSTRUCTIONS.

The records in the local land offices should be treated as open to inspection on the part of the public, subject only to the restriction that such examination shall not interfere with the orderly despatch of public business.

Secretary Bliss to the Commissioner of the General Land Office, November 25, 1898.
(W. V. D.) (G. B. G.)

The Department has considered your office communication of November 7, 1898, by which attention is invited to the case of Adolph Munter (2 L. D., 197, and 3 L. D., 174), which now governs the use of records and papers in local land offices.

It is suggested by your office that "the rule there prescribed is too liberal, and therefore needs limitation," and a proposed circular is transmitted, for the approval of the Department, which provides that:

Hereafter you (registers and receivers) will not allow examinations of your records or papers, except in the presence of some one connected with your office, and then only by persons directly interested, either as parties or attorneys, in the specific matter then pending to which such records or papers relate.

The case of Adolph Munter, *supra*, came to the Department upon his appeal from a decision of your office approving the action of the register and receiver at Spokane Falls land office, Washington Territory, refusing to allow him access to the records of the office for the purpose of making plats and transcripts of entries and filings. The Department held (3 L. D., 174), that the public have a right of access to the records of local land offices, for the purpose of obtaining information, or of making copies of such records, when the conduct of the public business will fairly permit, and that this is so regardless of the provisions of law requiring the land officers to give information and copies of records when requested, and allowing a fee for such service. In that case it was said:

When any person desiring information applies to examine the public records of the local land office, the question is not what business is the party engaged in, or what effect will his examination have upon the amount of fees that may accrue to the register and receiver; but rather, will such examination interfere unnecessarily with the public business? If not, then the person so applying must be permitted to have access to the records, "as a matter of well recognized right." Mr. Munter's rights are no greater and no less than those of any other individual under like circumstances, and it is a matter of no moment whether he is a resident of Washington Territory or of the State of Alabama. He asks access to the records of the local land office for the purpose of making copies of the same only "when the conduct of the public business will fairly permit." This access he has a right to demand, and the register and receiver have no right to deny it.

The rule at common law was that every person having an interest in public records is entitled to the inspection thereof, either by himself or his agent, and it was held sufficient authorization that he act as the representative of the common or public right.

The necessity of interest as a condition precedent to the right to inspect public records does not generally obtain in the United States. Such limitation is deemed repugnant to the genius of republican institutions.

In the case of Burton *v.* Tuite, 78 Mich., 363, it was said on this question:

I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it, or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for the purposes of selling such information, if I desire.

It is undoubtedly true that the right to inspect public records may be subjected to proper regulations, and if a person fails to conduct himself in a proper manner he may properly be denied access to such records. Boyden *v.* Burke, 14 How., 575.

It is also true that

in all cases of public writings, if the disclosure of their contents would, either in the judgment of the court or the chief executive magistrate, or the head of department in whose custody or under whose control they may be kept, be *injurious to the public interests,* an inspection will not be granted. Greenleaf on Evidence, 1-476.

These principles are, in effect, incorporated in an order of this Department issued by Mr. Secretary Teller, May 24, 1884, as follows:

Frequent requests are made for permission to examine the records and correspondence in this Department, and its several branches by persons not connected therewith. All its records are public and should be accessible for examination to any reputable citizen for a legitimate object. This should not apply to private claims, caveats, nor pending applications for letters patent. They should not, however, be opened to examination for idle, curious, or malicious ends. It is therefore—

Ordered, That any public record or account in this Department shall be subject to inspection by any reputable person, provided the specific record, subject, or account shall be set forth by such person and the reason given for the desired inspection.

Subordinate officers of the Department, in determining their action under this order, will exercise their own judgment as to whether any public or official interests in each case would be jeopardized by any such inspection, and, if in doubt, submit the matter for the action of higher authority, together with the reasons for refusal, if any exist.

It is the desire of the Secretary not to be embarrassed with the deciding of such cases, unless grave objections arise in the minds of subordinates to granting such requests. It should be borne in mind by those who, for the time being, are the custodians of the records and correspondence of their several offices, that they can have no *personal* interest in these matters, and that they are the servants of the public, for the public good.

This order has never been revoked. See 5 L. D., 400.

It is not perceived what public interest will be injured by the rule now in force in the matter of the examination of public records in the local land offices of the United States.

A proper regard for the rights of all citizens demands that they should at all times be permitted to examine these records, subject only

to the restriction that such examinations shall not interfere with the ordinary dispatch of public business.

Every citizen of the United States is interested, either immediately or remotely, in the disposition of the public domain, and has the right to inquire at all times and be informed in the most satisfactory manner what the records of these offices show, and the most satisfactory information that can be given may be a personal inspection of the records.

For the foregoing reasons, the said proposed circular of your office is returned without the approval of the Department.

ALASKAN LANDS—APPROVAL OF SURVEY.

OPINION.

In all cases where applications to purchase Alaskan lands were filed prior to January 21, 1898, and remained pending at the passage of the act of May 14, 1898, the survey of such claims must be considered and approved by the Commissioner of the General Land Office before entry can be allowed.

In the disposition of claims initiated under section 10, act of May 14, 1898, the survey of the land does not come before the Commissioner of the General Land Office for his consideration until after the entry is allowed, or upon appeal from rejection of the application.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, November 25, 1898. (E. F. B.)

Under your reference of the fifth instant I have considered the communication from the Commissioner of the General Land Office, wherein, referring to sections 12 and 13 of the act of March 3, 1891 (26 Stat., 561), and to section 10 of the act of May 14, 1898 (30 Stat., 409), he makes inquiry respecting the present authority of his office in approving the survey of lands in Alaska embraced in applications to purchase under these statutes.

By the terms of sections 12 and 13 of the act of March 3, 1891, one desiring to make purchase thereunder was required to apply to the surveyor general of the District of Alaska for a survey of the tract, and to deposit the estimated cost of such survey, whereupon the surveyor-general was authorized to employ a competent person to make the survey, the plat and field notes of which were to be submitted to the surveyor-general and then to the Commissioner of the General Land Office for approval; and on receiving notice of the Commissioner's approval of the survey the applicant could make purchase of the tract. Thus, under this statute, the approval of the survey by the Commissioner of the General Land Office was the next step in order of time after the approval thereof by the surveyor-general, and was a condition precedent to the obtaining of a cash entry.

Section 10 of the act of May 14, 1898, provides that all claims substantially square in form and lawfully initiated prior to January 21, 1898, by survey or otherwise, under sections 12 and 13 of the act of March 3, 1891, may be perfected and patented upon compliance with the provisions of the said sections 12 and 13, but subject to the require-

ments and provisions of the act of 1898, except as to area and excepting that no claim shall extend along a water front for more than one hundred and sixty rods. The statute of 1898 does not contain any requirement or provision modifying the procedure for perfecting claims embraced in applications under the earlier act and, hence, they are to be perfected according to the procedure prescribed by that act in all cases where the application was filed before January 21, 1898, and remained pending at the time of the enactment of the new statute, which means that the survey of such claims must be considered and approved by the Commissioner of the General Land Office before cash entry can be allowed.

Section 10 of the act of May 14, 1898, establishes a different method of procedure for claims initiated thereunder, whereby next after the survey is approved by the surveyor-general the applicant is to file in the local office, together with his application to purchase, a certified copy of the field notes and plat, and to prosecute the proceedings in that office to a conclusion, but the survey will not come before the Commissioner of the General Land Office for his consideration until after entry is allowed, or upon appeal from a rejection of the application.

While section 10 of the act of May 14, 1898, is silent respecting the authority of the Commissioner of the General Land Office over the survey of claims sought to be purchased thereunder, it contains no provision abrogating or restricting his general authority over the survey of public lands, and hence it is not doubted that the survey of such claims falls as completely within his general authority as does the survey of other public lands where there is no special provision to the contrary. In Catholic Bishop of Nesqually *v.* Gibbon (158 U. S., 155, 167), it is said:

> It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary.

The difference in the operation of the two acts of 1891 and 1898 is that under the earlier statute the Commissioner's consideration and approval of the survey was a prerequisite to the allowance of the cash entry, while under the later statute his consideration thereof must be postponed until a later period, and under the earlier statute a distinct and express act of approval on the part of the Commissioner was contemplated, while under the later act his approval will be sufficiently evidenced by passing the claim to patent.

Approved:

C. N. Bliss,

Secretary.

SETTLEMENT RIGHTS—TOWNSITE—JOINT ENTRY.

MEDIMONT TOWNSITE *v.* BLESSING.

A settlement right is personal and not the subject of transfer, hence the purchase of the possessory claim of an actual settler does not confer any priority of right as against a townsite settlement established prior to the settlement of such purchaser.

Section 2274 R. S., is only applicable to settlements made under the agricultural laws, and does not, therefore, authorize a joint entry as between a homesteader and townsite settlers.

Secretary Bliss to the Commissioner of the General Land Office, November 25, 1898.

(W. V. D.) (E. F. B.)

This controversy involves the right to the SW¼ of the NW¼ of Sec. 28, T. 48 N., R. 2 W., Coeur d'Alene, Idaho, embraced in the homestead entry of Titus Blessing, made August 13, 1894 (with other lands) to which a claim is asserted to the townsite of Medimont.

A hearing was had April 9, 1895, and at said hearing an agreement of that date, which had been entered into between Blessing, the trustees of the townsite (he being one of the trustees), and individual protestants, citizens of said town, was offered in evidence, by which it was stipulated that the town of Medimont might at any time—

apply for an entry of said townsite, embracing and including that portion of said last named subdivision as it is now platted and staked, without any further relinquishment on his part, and that in event that the said Titus Blessing shall make final proof upon his entry before the said town of Medimont shall perfect title to their townsite he will convey to said town of Medimont, by a good and sufficient deed, all that portion of the said SW¼ NW¼, now platted or staked as a part of said town, the said trustees of the town of Medimont paying to the government of the United States the legal price of said land.

This agreement was submitted to your office and by decision of May 20, 1895, the local officers were instructed that a relinquishment of a portion of a legal subdivision could not be accepted nor an entry allowed for less than a legal subdivision; but that the final proof of Blessing when offered should not be rejected, merely because of the occupancy of a small portion of the land, if such occupancy is shown to be of the character of the village settlement in the case of Francisco Mirabal, 20 L. D., 346. This decision was not appealed from.

On March 16, 1897, the probate judge of the county in which said land is situated applied to enter said tract of land together with the NW¼ of the SW¼ of said section 28, the latter tract being covered by the homestead entry of Jonathan H. Mauck, made August 17, 1894. This application was rejected as to the NW¼ of the SW¼ because of conflict with the entry of Mauck and as to the tract in controversy for the reason that the rights of the townsite settlers were concluded by the action of your office of May 20, 1895, which sustained the entry

of Blessing, subject to the right of the townsite settlers to show that their occupancy of the land was prior to the time when Blessing's claim was initiated and was not of the character of settlement shown in the Mirabal case.

Your office by letter of June 5, 1897, sustained this action and under instructions therein contained, a contest was filed by the townsite authorities under which a hearing was had October 21, 1897. Upon the testimony taken at this hearing the local officers found that the agreement entered into April 9, 1895, between Blessing and the townsite authorities was an equitable adjustment of the controversy, which gave the parties the land claimed by them respectively prior to survey, and that as the settlement of the town of Medimont was similar in character to the village settlement in the case of Francisco Mirabal the homestead entry of Blessing should remain subject to the terms of said agreement.

Your office by decision of July 20, 1898, held that—

the portion of the subdivision herein involved was selected and platted as a townsite long prior to Blessing's settlement; that the entire area of the tract so selected and platted, in both subdivisions, is not more than the needs of a very small town would reasonably require; that this portion of this subdivision forms a component part of a town which was founded for purposes of trade and business and residence, as it seems, the convenience and needs of the vicinity were thought to require; and that it has thereon the source of the water supply of other parts of the townsite, a stable used by one of the townsite claimants, and a school house, which, to my mind, is one of the highest evidences of its use for community purposes; besides containing many lots claimed and improved by other persons; I am led to the conclusion that it should not be awarded to the agricultural claimant.

You held, however, that as both parties went on the land prior to survey they should be allowed to make joint entry of the subdivision under section 2274 Revised Statutes. From said decision Blessing has appealed.

The material facts in this case are not controverted. In March 1891, before the government surveys were extended over this land, the townsite of Medimont was laid out upon what was afterwards shown by the government survey to be the $SW\frac{1}{4}$ of the $NW\frac{1}{4}$ and the $NW\frac{1}{4}$ of the $SW\frac{1}{4}$ of said section 28. The area as then laid out and platted in streets, blocks, and lots, covered about forty acres, which included sixteen or eighteen acres of the subdivision in controversy, now embraced in the homestead entry of Blessing.

During the year 1891 there were located on the townsite a store, postoffice, hotel, saloon, and three dwellings. Between that time and the date of hearing, other dwellings had been erected; also a school building, and a platform for necessary handling and use of freight and passengers brought and carried over the railroad that passed through the townsite. All of these buildings except the school house had been erected prior to Blessing's entry in 1894, and were placed on the $NW\frac{1}{4}$ of the $SW\frac{1}{4}$, being the part of the townsite covered by the entry of Jonathan H. Mauck.

Titus Blessing came to Medimont the 28th day of February, 1892, after the town had been laid out and platted into streets, lots, and blocks and after the improvements heretofore mentioned had been made, at which time it was used for the purpose of trade and business. While the school house which was located on the subdivision now in controversy was not built until after Blessing had settled and made his entry, a school had, prior thereto, been conducted upon the townsite in one of the dwelling houses in that part of the townsite covered by the entry of Mauck.

Blessing claims that when he came to Medimont he leased from Dan Edwards a squatter's right from March 2nd until June 15, 1892, at which latter date he purchased it for the sum of $430.00. Edwards' claim was to the greater part of the land embraced in the townsite and was initiated prior to the claim of the townsite settlers, but he waived his claim in favor of the townsite, at least to the extent over which its surveys were extended.

Edwards' settlement right was solely a personal right which he could not convey to another and Blessing could not acquire by lease or purchase from Edwards any right of settlement or any right of priority as against the townsite settlers, who had laid out, improved and occupied the land prior to his settlement in 1892.

It is true that the only improvements on that part of the townsite within the subdivision in controversy are, a private stable, a spring from which water is conducted upon other parts of the townsite, a school house built after the entry of Blessing was made, and several lots fenced and improved by some of the townsite settlers. But this subdivision is covered by part of the townsite as originally located and platted, prior to survey, over which the streets of the townsite were then extended. The townsite contains about twenty-five or twenty-six inhabitants, with improvements of the value of from two to three thousand dollars. The post-office was established in 1891, and the land has been used since that date for the purposes of trade and business by the inhabitants of the town and the surrounding country. The townsite settlers claim the right to enter said land under sections 2387 *et seq.*, Revised Statutes, which authorizes the entry by legal subdivisions, of the land actually occupied for town purposes. See circular July 9, 1886, 5 L. D., 265.

The rights of these claimants to the land in controversy must be determined by priority of settlement which extends to the legal subdivision settled upon. Edwards did not assert his prior right of settlement, and the next settlers in point of time were the townsite settlers, who included in their settlement a tract covering two legal subdivisions, and settlement upon part was settlement upon the whole.

Blessing did not come upon the land until after the right of the townsite settlers had attached, and can predicate no claim upon his purchase from Edwards, of what he calls his settlement right. Nor can he claim

any right by virtue of his agreement of April 9, 1895. The terms stipulated in said agreement could not be carried out and neither party appears to have taken any action thereunder, which would work an equitable estoppel, even if it could be here recognized. Section 2274 Revised Statutes is only applicable to settlements made under the agricultural laws with a view to preemption or homestead entry, and does not have reference to townsite settlements.

This case is not controlled by the decision of the Department in the case of Francisco Mirabel. In that case the land was not occupied for trade and business, and no claim was asserted thereto under the townsite laws. In the case at bar the townsite was laid out and platted, trustees appointed, and application has been regularly made by the constituted authorities to secure the title to the land for townsite purposes and to secure to the settlers the rights initiated by their settlement.

The decision of your office is therefore modified and in accordance with the views herein expressed, the homestead entry of Blessing will be canceled as to the SW. ¼ of the NW. ¼ of said Sec. 28, and the townsite settlers will be allowed to make entry of the same.

PRACTICE—ADVANCEMENT OF CASE—APPLICATION.

ROBLES *v.* KINCAID.

When a case is ready for consideration under the rules of practice it may be advanced on the docket without notice to either party.

Failure to appeal from the rejection of an application to enter does not defeat the right of the applicant, if he is not given the requisite notice in writing of the adverse action, and of his right of appeal therefrom.

Secretary Bliss to the Commissioner of the General Land Office, November 25, 1898.

(W. V. D.) (C. J. G.)

Jose Robles, through his attorneys, has filed a motion for review of departmental decision of September 2, 1898 (unreported), wherein is affirmed the action of your office in rejecting his homestead application as to the N. ½ of the SE. ¼ of Sec. 34, T. 5 N., R. 26 W., Los Angeles land district, California, and allowing the homestead entry of Joseph A. Kincaid therefor to remain intact.

The first three specifications of error are directed to the finding of the Department that Robles never established nor maintained a *bona fide* residence on the land in controversy, the same being used by him mainly for the purpose of cutting and selling the timber therefrom, and present no matters that have not already been expressly passed upon by the Department.

The fourth, fifth and sixth specifications are as follows:

In entirely overlooking the fact that at the date of the allowance of Kincaid's entry on June 10, 1897, Robles' homestead application, filed March 29, 1897, was

pending, undisposed of, on his appeal to the Commissioner and was returned for allowance by Commissioner's letter "N" of June 5, 1897.

In not holding that Kincaid's right, if any, to said land relates only to June 10, 1897, the date of his entry, and that Robles, in any event, is the prior legal applicant for the same.

In advancing this case over a year, out of its regular order for consideration, no notice having been given to contestant, as required by "Special order" of June 11, 1896 (22 L. D., 675), that this case would be treated as "current work" and the "rules relating to filing arguments would be strictly enforced."

The last specification will be considered first. The case under consideration does not come within any of the classes of cases specified in the special orders of January 29 and June 11, 1896 (22 L. D.; 120 and 675), and counsel so contends. Hence Robles was not entitled to the notice contemplated by the latter order. As to other cases when they are ready for consideration under the rules of practice they may be advanced on the docket without notice to either party (Lambert *v.* Fairchild, 5 L. D., 675). Your office rendered decision in the case March 26, 1898, and notice thereof was duly issued. The appeal of Robles from said decision was filed in your office May 31, 1898, and Kincaid filed his argument in reply thereto June 21, 1898. Your office forwarded the papers to the Department August 4, 1898, where, as heretofore set forth, decision was rendered September 2, 1898. Under the rules of practice the case was then ready for consideration, and could be advanced on the docket without notice and without prejudice to either party.

As to specifications numbers four and five, the facts of the case are that August 17, 1896, one John Loughead filed coal declaratory statement No. 17 embracing the land in controversy. March 4, 1897, Kincaid made homestead application covering said land, which was returned to him by the local office under date of March 6, 1897, for the reason that the land applied for was covered by Loughead's coal declaratory statement, and with the information that "if Mr. Loughead relinquishes all his right, title and interest in and to the land described to the United States your filing could be accepted." The plat of survey of the W. ½ of Sec. 34 was filed in the local office February 25, 1897; while that of the E. ½ thereof had been filed since April 20, 1875. March 29, 1897, Robles made homestead application for certain land, including that in controversy, which was also rejected for conflict with Loughead's coal declaratory covering said land, and Robles appealed. June 5, 1897, your office held that it was error to reject Robles' application because of conflict with Loughead's filing, for the reason that said filing did not segregate the land, but found that said application would have to be rejected as to a forty acre tract included therein and which had been patented to one George McKenzie under his timber land cash entry No. 5325. As the elimination of said forty acre tract would leave the remaining tracts claimed by Robles non-contiguous, he was required to elect which of the said remaining tracts he would retain, or to file a new application embracing the land in question on which his improvements

were located. June 10, 1897, Kincaid made another application for the same land he had previously applied for including that in controversy, and this application was allowed to go of record as homestead entry No. 8350. July 7, 1897, Loughead's coal declaratory statement was canceled by relinquishment. September 5, 1897, Robles filed a homestead affidavit and application covering the land in controversy, also a duly corroborated affidavit of contest alleging settlement and residence since July 26, 1890, at which time he claimed this particular tract. As a result of the hearing had on this affidavit the local office concluded as follows:

> The presence of Robles on the land seems to have had more the character of visits than of actual bona fide residence thereon. His wife had a house at Montecito which was the headquarters of the family at all times. The improvements made by him upon the land do not seem to have been made to improve a home, but rather for the purpose of maintaining such a show of a claim as might deter an honest settler from taking up the land. He claims to have made an expensive road to the claim but it is not shown to have been used for other purposes than hauling wood from the claim. . . . . He has cut wood at different places over the claim in extent about twenty acres, but has cleared for cultivation only about three acres. We do not think his occupation of the tract although extending over a long time has been of such a nature as shows an honest intent to make a home upon it for himself and family and such as would entitle him to a preferred right of entry over another settler, and we recommend that the homestead entry of Kincaid remain intact and the application of Robles to make homestead for the tracts claimed by him be denied.

Your office affirmed the judgment of the local office so far as Kincaid's entry is concerned, but permitted Robles to enter the land included in his application of September 5, 1897, excepting the land in controversy, if he should desire to do so and no valid objection should appear other than disclosed by the record. The Department, as heretofore stated, affirmed the action of your office.

Neither the local office nor your office discussed the question raised by the specifications under consideration. This matter was referred to on appeal, but the Department only passed upon the question of Robles' good faith in the matter of residence, although the question as to what right he secured by reason of his application of March 29, 1897, was not entirely overlooked. It will be observed that prior to that time, namely, on March 4, 1897, Kincaid had presented an application for the land in question. Under date of March 6, 1897, as hereinbefore set forth, the local officers returned to Kincaid his said application "for the reason that the land applied for is covered by the coal land declaratory statement of John Loughead, made August 17, 1896." Subjoined to their letter was the further information that "if Mr. Loughead relinquishes all his right, title and interest in and to the land described to the United States your filing could be accepted." It is contended in the motion that inasmuch as Kincaid never took any appeal from this action of the local officers, his right to the land in controversy relates only to June 10, 1897, the date of his entry; prior to which time Robles had applied to enter said land. It appears

that the reason for the return of Kincaid's application was never indorsed thereon, nor was he advised of his right of appeal to your office, as required by the rules of practice. It has been repeatedly held that failure to appeal from the rejection of an application to enter does not defeat the right of the applicant if he is not given the requisite notice in writing of the adverse action and of his right of appeal therefrom. Thus, if the action of the local officers may be considered a rejection of his application, still Kincaid was not bound to appeal, in order to preserve his rights, until he was legally notified of his right to do so. On the contrary, he followed the advice given by the local officers, and just as soon as the obstacle named by them to the allowance of his entry was removed by Loughead's relinquishment, he again applied to make entry. It is plain, in view of the fact that Loughead's coal declaratory did not segregate the land, that Kincaid's application was erroneously returned. At that time, as well as at the date of Robles' application of March 29, 1897, he was a settler on the land in good faith, and continued to reside thereon up to the time of the allowance of his application on June 10, 1897. In the view here expressed his rights are not limited or determined by his said application of June 10, 1897, but date back to his application of March 4, 1897. As that was prior to Robles' application, and as it was shown that he was all along a *bona fide* settler, priority of right should be accorded to Kincaid. Especially is this true in face of the proof that Robles failed to establish and maintain residence on the land.

The case of Pfefferkorn *v.* Mueller, cited in the motion and in which the Department rendered decision October 24, 1898 (unreported), is not applicable to the case under consideration, for the reason that Pfefferkorn's application was properly rejected and hence did not operate to reserve the land covered thereby, whereas Kincaid's was not, and the latter's application being thus improperly returned was equivalent to an entry The motion for review is hereby denied.

REGULATIONS CONCERNING THE SELECTION OF DESERT LANDS BY CERTAIN STATES.

Section 4 of the act of August 18, 1894, entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes" (28 Stat., 372–422), authorizes the Secretary of the Interior, with the approval of the President, to contract and agree to patent to the States of Washington, Oregon, California, Nevada, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, and Utah, or any other States, as provided in the act, in which may be found desert lands, not to exceed 1,000,000 acres of such lands to each State, under certain conditions.

The text of the act is as follows:

SEC. 4. That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual

settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, one thousand dollars.

In the act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1897, and for other purposes, approved June 11, 1896, there is, under the head of appropriation for "Surveying public lands," the following provision:

That under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an act entitled "An act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then

patents shall issue for the same to such State without regard to settlement or cultivation: *Provided*, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

1. The second paragraph of section 4, quoted above, requires that the State shall first file a map of the land selected and proposed to be irrigated, which shall exhibit a plan showing the mode of contemplated irrigation and the source of the water. In accordance with the requirements of the act, the State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; for which purpose a statement of the amount of water available for the plan of irrigation will be necessary. The other data required can not be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the land selected must be submitted. Upon the filing of such map and accompanying plan of irrigation, the lands embraced therein will be withheld from other disposition until final action is had thereon by the Secretary of the Interior. If such final action be a disapproval of the map and plan, the lands selected shall, without further order, be subject to disposition as if such reservation had never been made; and the local officers will make the appropriate notations on the tract books and plat books, opposite those previously made, in accordance with the requirements of paragraph 7.

2. The map must be on tracing linen, in duplicate, and must be drawn to a scale not greater than 1,000 feet to 1 inch. A smaller scale is desirable, if the necessary information can be clearly shown.

3. The map and field notes in duplicate must be filed in the local land office for the district in which the land is located. A plan and field notes covering tracts selected in several land districts need be filed but once in duplicate; one copy in the other districts will be sufficient; but in such case a duplicate map of the lands, at least, must be filed in each local land office, showing the lands to be segregated in that district. The map and field notes must show the connections of termini with public survey corners, the connections with public survey corners wherever section or township lines are crossed by the irrigation works proposed, and must show full data to admit of retracing the lines of the survey of irrigation works on the ground

4. The map should bear an affidavit of the engineer who made or supervised the preparation of the map and plan, form 1, page 8, and also of the officer authorized by the State to make its selections under the act, form 2, page 8.

5. The map should indicate clearly the tracts selected, which must all be desert lands as defined by the acts of 1877 and 1891, and the decisions and regulations of this office therein provided for. The language of the former act and the decisions thereunder are as follows: "All lands exclusive of timber lands and mineral lands, which will not,

without artificial irrigation produce some agricultural crop, shall be deemed desert land." It is prescribed also as follows:

First. Lands bordering upon streams, lakes, or other natural bodies of water, or through or upon which there is any river, stream, arroyo, lake, pond, body of water, or living spring, are not subject to entry under the desert land law until the clearest proof of their desert character is furnished.

Second. Lands which produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons, are not desert lands.

Third. Lands which will produce an agricultural crop of any kind, in amount to make the cultivation reasonably remunerative, are not desert.

Fourth. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

6. The map should be accompanied by a list in triplicate of the lands selected, designated by legal subdivisions. When a township has not been subdivided, but has had its exteriors surveyed, the whole township may be designated, and when the records are in such condition that the proper notations may be made, a section or part of a section may be designated; but no patent can issue thereon until the land has been surveyed. This list should be dated and verified by a certificate of the selecting agent, form 3, page 9. The party appearing as agent of the State must file with the register and receiver written and satisfactory evidence, under seal, of his authority to act in the premises.

7. The lists must be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office. When so examined and found correct in all respects they will so certify at the foot of each list, form 4, page 9. The State should number the lists in consecutive order, beginning with No. 1, regardless of the land office in which they are to be filed. The register will thereupon post the selections in ink in the tract book after the following manner:

"Selected ———, 18—, by A. B., agent for the State of ———, as desert land, act of August 18, 1894, list No. ———," and on the plats he will mark the tracts so selected "State desert land selection." After the selections are properly posted and marked on the records, the lists, papers, and maps will be transmitted to this office accompanied by the evidence of the agent's appointment. It is required that clear lists of approvals shall in every case be made out by the selecting agents, if after the above examination one or more tracts have been rejected, showing clearly and without erasure the tracts to which the register is prepared to certify, also the aggregate area properly footed in the columns and set forth in the certificate.

For rejected selections a new application and a new list will be required, upon which the register will note opposite each tract the objections appearing on the records, and indorse thereon his reasons

in full for refusing to certify the same. The agent will be allowed to appeal in the manner provided for in the Rules of Practice. Lists containing erasures received at this office will not be filed, but will be returned for perfection. Form of title page to be prefixed to the lists of selections will be found on page 9, marked A. On the map of lands selected the register will mark *rejected* such tracts as he has rejected on the lists.

8. To the list of selections must be added a contract of form 5, page 9, signed by the State officer authorized to make such contract.

9. When the canals or reservoirs required by the plan of irrigation cross public land not selected by the State, an application for right of way over such lands under sections 18 to 21, act of March 3, 1891, (26 Stat., 1085), should be filed separately, in accordance with the regulations under said act.

10. In the preceding paragraphs instructions are given for the designation of the lands by the proper State authorities. Upon the approval of the map of the lands and the plan of irrigation, the contract is executed by the Secretary of the Interior and approved by the President, as directed by the act. Upon the approval of the map and plan, the lands are reserved for the purposes of the act, said reservation dating from the date of the filing of the map and plan in the local land office. A duplicate of the approved map and plan, and of the list of lands, is transmitted for the files of the local land office, and a triplicate copy of the list is forwarded to the State authorities.

11. By the Honorable Secretary's decision of January 22, 1898 (26 L. D., 74), it was held that the act of 1896 applies to all lands segregated under the act of 1894, and patents will be issued for all such lands in accordance therewith.

12. When patents are desired for any lands that have been segregated, the State should file in the local land office a list, to which is prefixed a certificate of the presiding officer of the State land board, or other officer of the State who may be charged with the duty of disposing of the lands which the State may obtain under the law, form 6, page 11; and followed by an affidavit of the State Engineer, or other State officer whose duty it may be to superintend the reclamation of the lands, form 7, page 11.

13. The certificate of form 6 is required in order to show that the State laws accepting the grant of the lands have been duly complied with.

14. The affidavit of form 7 is required in order to show compliance with the provisions of the law, that an ample supply of water has been actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to each tract in the list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise ordinary agricultural crops.

15. These lists will be called Lists for Patent, and should be numbered by the State consecutively, beginning with No. 1. The list should also show, opposite each tract, the number of the approved segregation list in which it appears.

16. Upon the filing of such list, the local officers will place thereon the date of filing, and note on the records opposite each tract listed: List for Patent No. ———, filed —— ——, giving the date.

17. When said list is filed in the local land office there shall also be filed by the State a notice, in duplicate, prepared for the signature of the register and receiver, describing the land by sections, and portions of sections where less than a section is designated (form 8, page 12). This notice shall be published at the expense of the State once a week in each of five consecutive weeks in a newspaper of established character and general circulation, to be designated by the register as published nearest the land. One copy of said notice shall be posted in a conspicuous place in the local office during the entire period of publication.

18. At the expiration of sixty days from the date of the first publication, the State shall file in the local office proof of said publication and of payment for the same. Thereupon the register and receiver shall forward the List for Patent to the Commissioner of the General Land Office, noting thereon any protests or contests as to failure to comply with the law or as to prior adverse rights, together with any recommendations they may deem proper.

19. Upon the receipt of the papers in the General Land Office such action will be taken in each case as the showing may require and all tracts that are free from valid protest or contest, and respecting which the law and regulations have been complied with, will be certified to the Secretary of the Interior for approval and patenting.

F. W. MONDELL,
Acting Commissioner General Land Office.

Approved September 20, 1898:
THOS. RYAN,
Acting Secretary of the Interior.

FORM 1.

STATE OF ———,
County of ———, *ss:*

——— ———, being duly sworn, says he is the engineer under whose supervision the survey and plan hereon were made (or is the person employed to make, etc.) for the State of ———, and under its authority; that the tracts shown hereon to be selected are each and every one desert land as contemplated by the act of Congress approved August 18, 1894 (28 Stat., 372–422), and the act of June 11, 1896 (29 Stat., 434); none being of the classes designated as timber or mineral lands; that the plan of irrigation herewith submitted is accurately and fully represented in accordance with ascertained facts; that the system proposed is sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary crops; and that the survey of said system of irrigation is accurately represented upon this map and the accompanying field notes.

——— ———,

——— ———.

Subscribed and sworn to before me this —— day of ———, 189—.
[SEAL.]

——— ———,
Notary Public.

FORM 2.

STATE OF ———,

County of ———, *ss:*

——— ———, being duly sworn, says that he is the ——— (designation of office) authorized by the State of ——— to make desert land selections under the act of Congress approved August 18, 1894 (28 Stat., 372–422), and the act of June 11, 1896 (29 Stat., 434); that ——— ———, who subscribed the foregoing affidavit, is the engineer under whose supervision the survey and plan hereon were made (or is the person employed to make, etc.) under the authority of the State; that the plan of irrigation and survey herewith is submitted under authority of the State of ———; and that the tracts shown hereon to be selected are each and every one desert land, as contemplated by the said act of Congress, none being of the classes designated as timber or mineral lands.

——— ———.

——— ———.

Subscribed and sworn to before me this —— day of ———, 189—.

[SEAL.] ——— ———,

Notary Public.

FORM 3.

STATE OF ———,

———, *ss:*

I, ——— ———, being duly sworn, depose and say that I am ——— (designation of office) authorized by the State of ——— to make desert land selections under the act of Congress approved August 18, 1894 (28 Stat., 372–422), and the act of June 11, 1896 (29 Stat., 434); that the foregoing list of lands which I hereby select is a correct list of lands selected under said act; that the lands are vacant, unappropriated, are not interdicted timber nor mineral lands, and are desert lands as contemplated by the said act of Congress.

——— ———.

Subscribed and sworn to before me this —— day of ———, 189—.

[SEAL.] ——— ———,

Notary Public.

FORM 4.

UNITED STATES LAND OFFICE,

——— ———.

——— ———.

We hereby certify that we have carefully and critically examined the foregoing list of lands selected ——— ———, 189—, by ——— ———, the duly authorized agent of the State of ———, under the provisions of the act of Congress approved August 18, 1894 (28 Stat., 372–422), and the act of June 11, 1896 (29 Stat., 434), and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct. And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof returned and denominated as mineral or timber lands; nor is there any homestead or other valid claim to any portion of said lands on file or record in this office; and that the said lands are, to the best of our knowledge and belief, desert lands, as contemplated by the said act of Congress; and that the fees amounting to $——— have been paid upon the said area of ——— acres.

——— ———, *Register.*

——— ———, *Receiver.*

A.

STATE OF ———,
UNITED STATES LAND OFFICE,
——— ———, *189—*.

——— ———, the duly authorized agent of the State of ———, under and by virtue of an act of Congress approved August 18, 1894 (28 Stat., 372-422), and the act of June 11, 1896 (29 Stat., 434), and in pursuance of the rules and regulations prescribed by the Secretary of the Interior, hereby makes and files the following list of selections of desert public lands which the State is authorized to select under the provisions of the said act of Congress, the selections being particularly described as follows, to wit:

FORM 5.

These articles of agreement, made and entered into this —— day of ———, A. D. 189—, by and between ——— ———, Secretary of the Interior, for and on behalf of the United States of America, party of the first part, and ——— ———, for and on behalf of the State of ———, party of the second part, witnesseth:

That in consideration of the stipulations and agreements hereinafter made, and of the fact that said State has, under the provisions of section 4 of the act of Congress approved August 18, 1894, and of the act of Congress approved June 11, 1896, through ——— ———, its proper officer, thereunto duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character, and particularly described as follows, to wit: (here insert list of lands), and has filed a map of said lands, and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed, and the source of the water to be used for that purpose, the said party of the first part contracts and agrees, and, by and with the consent and approval of ——— ———, President thereof, hereby binds the United States of America to donate, grant and patent to said State, or to its assigns, free from cost for survey or price, any particular tract or tracts of said lands, whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same, in accordance with the provisions of said acts of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time prior to the 18th day of August, 1904.

It is further understood that said State shall not lease any of said lands or use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement; and that in selling and disposing of them for that purpose the said State may sell or dispose of not more than 160 acres to any one person, and then only to bona fide settlers who are citizens of the United States, or who have declared their intention to become such citizens; and it is distinctly understood, and fully agreed that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands.

It is further understood and agreed that said State shall have full power, right and authority, to enact such laws, and from time to time to make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such irrigation and reclamation thereof as is required by this contract and the said acts of Congress; but no such law, contract or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said acts of Congress, and then only after the requirements of said acts and contracts have been fully complied with.

Neither the approval of said application, map and plan, nor the segregation of said land by the Secretary of the Interior, nor anything in this contract, or in the said acts of Congress, shall be so construed as to give said State any interest what-

ever in any lands upon which, at the date of the filing of the map and plan hereinbefore referred to, there may be an actual settlement by a bona fide settler, qualified under the public land laws to acquire title thereto.

It is further understood and agreed that as soon as an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of said lands, the said State, or its assigns, may make proof thereof under and according to such rules and regulations as may be prescribed therefor by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory, patents shall issue to said State, or to its assigns, for the tracts included in said proof.

The said State shall, out of the money arising from its disposal of said lands, first reimburse itself for any and all costs and expenditures incurred by it in irrigating and reclaiming said lands, or in assisting its assigns in so doing, and any surplus then remaining after the payment of the cost of such reclamation shall be held as a trust fund to be applied to the reclamation of other desert lands within said State.

This contract is executed in duplicate, one copy of which shall be placed of record and remain on file with the Commissioner of the General Land Office, and the other shall be placed of record and remain on file with the proper officer of said State, and it shall be the duty of said State to cause a copy thereof, together with a copy of all rules and regulations issued thereunder or under said acts of Congress, to be spread upon the deed records of each of the counties in said State in which any of said lands shall be situated.

In testimony whereof, the said parties have hereunto set their hands, the day and year first herein written.

——— ———,

Secretary of the Interior.

State of ———.

By ——— ———.

APPROVAL.

To all to whom these presents shall come, Greeting:

Know ye, that I, ——— ———, President of the United States of America, do hereby approve and ratify the attached contract and agreement, made and entered into on the —— day of ———, 189—, by and between ——— ———, Secretary of the Interior, for and on behalf of the United States, and ——— ———, for and on behalf of the State of ———, under section 4 of the act of Congress approved August 18, 1894, and the act approved June 11, 1896.

——— ———.

President of the United States.

FORMS FOR VERIFICATION AND PUBLICATION OF LISTS FOR PATENT

FORM 6.

I, ——— ———, do hereby certify that I am the ——— ———, (designation of office) of the State of ——— ———; that I am charged with the duty of disposing of the lands granted to the State by section 4, act of August 18, 1894 (28 Stat., 372–422), and the act of June 11, 1896 (29 Stat., 434); and that the laws of the said State relating to the said grant from the United States, have been complied with in all respects as to the following list of lands prepared on behalf of the said State for the issuance of patent under said acts of congress.

——— ———,

——— ———.

[Here add list of lands.]

FORM 7.

To follow list of lands.

STATE OF ———,
County of ———, *ss:*

—— ——, being duly sworn, deposes and says that he is the —— —— (designation of office) of the State of ———, charged with the duty of supervising the reclamation of lands segregated under section 4, act of August 18, 1894 (28 Stat., 422), and the act of June 11, 1896 (29 Stat., 434); that he has examined the lands designated on the foregoing list, and that an ample supply of water has been actually furnished (in a substantial ditch or canal, or by artesian wells or reservoirs) for each tract in said list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise ordinary agricultural crops.

——— ———,
——— ———.

Subscribed and sworn to before me this —— day of ———, 189—.
[SEAL.]
——— ———,
Notary Public.

Form for published notice.

FORM 8.

UNITED STATES LAND OFFICE,
———, ———, *189*—.

To whom it may concern:

Notice is hereby given that the State of ——— has filed in this office the following list of lands, to wit: ——— and has applied for a patent for said lands under the acts of August 18, 1894 (28 Stat., 372-422), and June 11, 1896 (29 Stat., 434), relating to the granting of not to exceed a million acres of arid land to each of certain States; that the said list, with its accompanying proofs, is open for the inspection of all persons interested and the public generally.

Within the next 60 days following the date of this notice, protests or contests against the claim of the State to any tract described in the list, on the ground of failure to comply with the law or on the ground of a prior adverse right, will be received and noted for report to the General Land Office at Washington, D. C.

—— ———, *Register.*
——— ———, *Receiver.*

SCHOOL LANDS—INDEMNITY SELECTION—SURVEY.

DERRICK *v.* STATE OF CALIFORNIA.

The right of a State to amend a school indemnity selection, by substituting a valid for an invalid basis, may be recognized in the absence of an adverse claim, but the selection in such case is only effective from the date when the defect is cured.

A school indemnity selection can not be allowed on an alleged loss that is not definitely ascertained by survey.

Secretary Bliss to the Commissioner of the General Land Office, November 25, 1898.
(W. V. D.) (G. B. G.)

March 14, 1896, the State of California applied to select the SW. ¼ of the NW. ¼ of Sec. 4, T. 28 N., R. 1 W., Redding, California, alleging as a basis therefor forty acres deficit as lost to its school grant in Sec. 16, T. 26 N., R. 8 E., which selection was accepted May 13, 1896.

October 1, 1896, Albert F. Derrick applied to make homestead entry

of the tract selected by the State, alleging that he settled on the land January 1, 1896, and has since resided there, and also alleging improvements thereon to the value of $300.00, consisting of a dwelling house, twenty-four by twenty-four feet, out houses, irrigating ditch, and about ten acres fenced and under cultivation.

By your office letter of October 15, 1896, the local officers at Redding were directed to call upon the State to show cause why said indemnity selection should not be canceled for conflict with the rights of Derrick, under the homestead law, and by the same letter the State's said selection was held for cancellation.

Notice was duly given pursuant to this order, and on December 16, 1896, an answer, supported by several affidavits, was filed on behalf of the State, admitting that Derrick was staying in a cabin on the land during the months of July and August, 1896, but alleging that he was not a *bona fide* settler, that the value of the improvements on said land is only about fifty dollars, and that Derrick had no land fenced and had cultivated less than one acre.

The State further alleged that in the month of September, 1896, Derrick took his family and all of his household goods and went to the vicinity of Red Bluff, about fifteen miles from the land in dispute, and has resided there ever since; and, further, that the cabin on the land in dispute remained unoccupied from the time Derrick left it until some time in November, 1896, when it was taken possession of by some Japanese wood choppers, who have occupied it ever since.

In view of this showing, your office, by letter of January 14, 1897, ordered a hearing between Derrick and the State of California to determine their respective rights.

February 20, 1897, your office reconsidered the matter, rescinded the order for a hearing, and held the State's selection for cancellation, because a proper basis had not been assigned therefor. The case of the State of California *v.* Wright (24 L. D., 54,) was cited in support of this action.

The State has appealed.

Township 26 north, range 8 east, within which is situated the basis assigned by the State in support of its selection of the land in controversy, was and is unsurveyed land.

In the case of the State of California *v.* Wright (*supra*), it was held that "an alleged loss in an unsurveyed township will not authorize a school indemnity selection."

It is alleged on appeal that the records of the mineral division of your office show that an official plat of the survey of the Sunnyside No. 2 Placer mine (lot No. 45), covering a large portion of Sec. 16, T. 26 N., R. 8 E., was approved by the United States surveyor-general, December 3, 1877, and that corner No. 5 of this mining claim was connected with the corner common to sections 12 and 13, T. 26 N., R. 7 E., and sections 7 and 8, T. 26 N., R. 8 E., by a course of south 89 degrees,

47 minutes west 165.18 chains. It is also asserted that other placer mining claims have since been surveyed in the said section 16. It is further alleged that these surveys are all subsisting.

It is contended that these mineral surveys segregate the land embraced therein from the public domain; that the land having been determined to be mineral, it is lost to the State; that a mineral survey, regularly made and approved, is a public survey, and that the tie line of the claim to a corner of the surveyed public domain fixed the locus for all time.

It is further contended that, even though it be held that the basis designated by the State is insufficient to support the selection,

> the allegations of the State as to non-compliance with law on the part of Derrick are sufficiently grave to warrant the ordering of a hearing, and should non-compliance be established as a fact at the hearing, Derrick could acquire no rights in the premises and his homestead filing would thereupon be canceled. In such an event, the State's right would be paramount, and it could then, if necessary, amend its selection by presenting new basis to support the original claim for the land.

The last contention may be dismissed, with the statement that if the selection of the State rests on an invalid basis, it took nothing thereby, and while this defect might be cured by amendment, in the absence of an intervening adverse claim, the right of the State would take effect only from the date when the defect was cured. Barclay *et al. v.* The State of California (6 L. D., 699). So that, even if a hearing were ordered upon the allegations of the State against the homestead claim of Derrick, and those allegations established, it would not necessarily result that the State would have the right to amend its selection.

The main question raised by the appeal is not altogether free from doubt.

While the general rule, as above stated, is well settled, that an alleged loss in an unsurveyed township will not support a school indemnity selection, it is also true, in general, that the right to select indemnity vests immediately upon the legal ascertainment that a school section is lost to the State.

In the case of the State of California (3 L. D., 327), it was held that when the public surveys had ascertained that a certain school section in that State was included within an Indian reservation, which had been established two years prior to the survey, and was thereby "reserved for public uses," the right of the State to select lieu lands immediately attached. In that case it was said:

> The State's right to indemnity for lands found by the public survey to be within any of the exceptions specified by the statute was absolute and immediate, and when it was discovered that the school lands or any portion thereof had been lost in place, the right to select other land in lieu thereof accrued to the State *eo instanti*. See also State of California, 15 L. D., 350.

In the case of the State of Oregon, 10 L. D., 498, it was held that, if the exterior lines of a fractional township are established, and the loss

to the State of section thirty-six is thereby made certain, indemnity for such loss may be allowed, though the township is not subdivided.

The question remains whether Sec. 16, T. 26 N., R. 8 E., has been lost to the State of California under its school grant, and if lost, whether that loss has been legally and definitely ascertained.

The records of the mineral division of your office have been examined, and show that the survey of the Sunnyside No. 2 Placer mine was made and approved as alleged, and that it was located according to the official plat upon what is there indicated as Sec. 16, T. 26 N., R. 8 E. But it appears further from the records of the mineral division that a mineral entry, based upon this location and survey, was canceled in the year 1889 upon the relinquishment of the mineral claimants. It does not appear whether the claim has been relocated, but, so far as the records of your office show, no other entry has ever been made. It further appears from an examination made in the surveying division of your office that township 26 north, range 7 east, has not been surveyed. The survey of said township has been made in the field, but has not been approved, and until approved, it is not an official survey of the United States.

It appears, therefore, that neither township 26 north, range 8 east, in which the alleged loss to the State is situated, nor township 26 north, range 7 east, in which is located the corner to which this mineral survey is tied, are surveyed lands. This being so, the locus of the alleged loss is altogether too uncertain to authorize the selection of indemnity therefor at this time.

Even if this were not so, the evidence of the alleged mineral character of the land, in view of the fact that it is not shown to be covered by a subsisting mineral location at this time, is not sufficient to authorize the selection of indemnity therefor.

The State's application to select the land in controversy is rejected, without prejudice to its right to make another selection in lieu of Sec. 16, T. 26 N., R. 8 E., upon a satisfactory showing that said section is lost to the State by reason of its mineral character or for any other reason authorizing indemnity.

The decision appealed from is affirmed.

HOMESTEAD ENTRY—DISQUALIFICATION—OWNERSHIP OF LAND.

VAUGHN ET AL. *v.* GAMMON (ON REVIEW).

The disqualification under the homestead law arising from the ownership of land is determined by the conditions existing at the date of the entry, and not at final proof.

Secretary Bliss to the Commissioner of the General Land Office, November 29, 1898.

(F. L. C.) (G. C. R.)

William R. Vaughn has filed a motion for review of departmental decision of September 23, 1898 (27 L. D., 138), which, in effect, dis-

missed his protest against the final proof offered by William Gammon, on January 18, 1896, upon his homestead entry, made June 7, 1889, for the NW. ¼ of Sec. 27, T. 14 N., R. 4 W., Kingfisher, Oklahoma.

Said decision held that Gammon was a qualified entryman; that his absences from the land were excusable; that he entered the land in good faith—i. e., for his own use and benefit—and finally that Vaughn disqualified himself by being in the territory during the prohibited period, and in failing to go out and make the race with others. The matters so decided had been the subject of controversy, and the decision complained of fully set forth the reasons upon which the several holdings were based.

The motion herein contains ten specifications of error. These specifications, with one exception, relate to matters fully discussed and decided in said departmental decision.

The exception relates to the qualifications of Gammon, who it appears at date of entry was the owner and proprietor of about four hundred acres of land in the State of Kansas. He made his entry, as above seen, June 7, 1889, and it was held in the decision complained of that at date of said entry

> there was no prohibition in the statutes against one making entry of government lands, who at the time was the owner of other lands in any quantity, in any state or territory, provided he had not made a former entry under the homestead laws.

Reference was made to the act approved May 2, 1890 (26 Stat., 81), which for the first time limited the right of entry to persons who were not seized in fee simple of "a hundred and sixty acres of land in any state or territory," and to the general act of March 3, 1891 (26 Stat., 1095), amending section 2289 of the Revised Statutes limiting the right of entry to persons who were not the proprietors "of more than one hundred and sixty acres of land in any state or territory."

Movant now contends "that if the entryman is the owner of one hundred and sixty acres of land when he completes his entry, he is disqualified;" in other words, he appears to take the position that, although the ownership of one hundred and sixty acres of land may not disqualify the applicant to make entry if such application is made prior to the passage of the act of May 2, 1890 (supra), yet if the entry is allowed, he cannot be permitted to "complete his entry"—i. e., make final proof—if upon its submission he is still the owner of one hundred and sixty acres of land, &c.

This position is not tenable. To so hold would be to give a retroactive operation to the statute. Where an entry of land is allowed to one who is qualified at the time he makes such entry, no subsequent legislation, restricting generally the qualifications of an applicant, will affect the entry then made. If this were not true, one who, under existing laws, is qualified to make entry, and does enter public lands, would be restrained from buying one hundred and sixty acres or more of lands until he had offered final proof upon his entry. The law imposes no such inhibition.

Apart from the question thus discussed, the motion herein contains no questions of law or fact which were not fully discussed and decided in the decision complained of; and, upon due consideration of all that is presented in the motion, no sufficient grounds appear for disturbing the conclusions reached by the Department.

The motion is therefore denied.

RIGHT OF WAY—ACT OF JULY 27, 1866—PIPE LINE.

SANTA FE PACIFIC R. R. CO.

Under section 2, act of July 27, providing for a right of way for the Atlantic and Pacific railroad "including all necessary grounds for . . . . water stations" it can not be held that a "pipe line" is embraced in the general provision for a "water station;" and where the application shows that the necessity for said line arises from causes other than the operation and maintenance of the road it can not be approved.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) *December 3, 1898.* (F. W. C.)

With your office letter "F" of June 13, 1898, was submitted, with the recommendation that the same be approved, subject to all valid existing rights, a map upon which was delineated a pipe line from Clear Creek to Winslow, in the Territory of Arizona, which was filed by the Santa Fe Pacific Railroad Company, successor to the Atlantic and Pacific Railroad Company, as an application for right of way for said pipe line, the same being claimed under the provisions of section 2 of the act of Congress of July 27, 1866 (14 Stat., 292), which incorporated the Atlantic and Pacific Railroad Company and made a grant to aid in the construction thereof.

In your said office letter it is stated that the recommendation for the approval of said map is made "in accordance with the decision of the Department in the case of the Union Pacific Railroad Company, 25 L. D., 540." The only question involved in said decision was, as to whether the entire grant of right of way was limited to the two hundred feet specified in the act as the general right of way along the line of the road, and therein it was held that the right of way may extend beyond the two hundred feet on either side of the road where the land is desired for the uses specified in the act and the necessity for the use is made to appear. The particular application there under consideration presented a case where the company desired additional lands immediately adjoining the right of way for station purposes. The decision in that case, however, is not controlling in the case now before the Department.

In support of the application now under consideration the affidavit of R. B. Burns, chief engineer of the Santa Fe Pacific Railroad Company, is filed, from which it appears:

That the Atlantic and Pacific Railroad Company in the year 1886 constructed a pipe line from Clear Creek to Winslow, over and upon the same line shown in the

application herein referred to, and that it built a pumping plant at Clear Creek and operated a three-inch pipe line for the conveyance of water from Clear Creek to Winslow for the company's uses, a distance of ——— miles, and that from 1886 up to the present time it has used said pipe line and such pumping plant constantly and continuously.

Affiant further says that from the time the said railroad was built to Winslow up to the present time the town of Winslow has grown from nothing to a town of about 2,000 inhabitants and that the railroad company has always been forced to supply and furnish the inhabitants of the said town with their water for domestic purposes because said town and its inhabitants had and have no other or further water supply.

Affiant further says that the railroad company has a large roundhouse and small machine shops at Winslow and that said town is the end of a division for a large number of trains coming from each direction over said road, and is one of the important points on the line of the Santa Fe Pacific railroad in Arizona.

Affiant further says that it became and has become necessary to increase the capacity of said pipe line for the uses and business of the said railroad company, as well as for the uses of the inhabitants of the town of Winslow, and that affiant, under the direction of the management of the Santa Fe Pacific Railroad Company, heretofore prepared a map of the location of a pipe line of larger capacity and furnished the same to the legal department of the said road for the purpose of having the same filed in the General Land Office of the United States.

From the above it is apparent that the company has, since 1886, rested in the enjoyment of the right of way occupied by its present pipe line without the approval of this Department; further, it would appear that the present pipe line conveyed water in sufficient quantities for the general uses of the company, aside from the demand for domestic and other purposes by the occupants of the town of Winslow, which has grown up since the building of the said pipe line by the company; that the increased demand by reason of the necessities of the town has made it necessary to increase the supply, and the present application is evidently filed with a view to securing departmental approval before enlargement of the scheme.

The section under which the approval of the present application is requested reads as follows:

That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations.

It will be seen that aside from the general grant of the right of way of two hundred feet along the line of the company's road, the only additional lands provided for are those made necessary "for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations."

It can not be held that a pipe line is embraced in the general provision made for a water station, and inasmuch as it is disclosed by the

showing filed in support of the application that the enlargement of the present pipe line is made necessary by reason of other causes than the operation and maintenance of the railroad, it must be held that the application does not come within the purpose and intention of the provisions of the section above quoted, and the Department must therefore refuse to give its approval to the said map, which is herewith enclosed, together with the other papers filed in support thereof. Whether the company is protected in the enjoyment of the ground actually used in the construction and operation of said pipe line under other provisions of law is not now before the Department for consideration.

RAILROAD GRANT—INDEMNITY SELECTION—CANCELLATION OF ENTRY.

NORTHERN PACIFIC R. R. CO. ET AL. *v.* REED ET AL.

Under a judgment holding an entry subject to the right of a railroad company to make indemnity selection of the land, the subsequent allowance of such selection works in effect a cancellation of the entry then of record; and the validity of such selection is not affected by the fact that the entry is not formally canceled at such time.

Secretary Bliss to the Commissioner of the General Land Office, December 6, 1898.

(W. V. D.) (F. W. C.)

The Northern Pacific Railroad Company, Ole O. Olson and John E. Lasham have each appealed from your office decision of March 19, 1898, in which the indemnity selection made by the Northern Pacific Railroad Company, covering the N. ½ of Sec. 29, T. 148 N., R. 50 W., Fargo land district, North Dakota, was held for cancellation, the homestead applications of Ole O. Oleson and John E. Lasham, together covering said N. ½ of Sec. 29, were rejected, and the right to purchase said tract under the provisions of section five of the act of March 3, 1887 (24 Stat., 556), was awarded to Hugh Reed and O. L. Hanson.

This tract is within the indemnity limits of the grant for said company as adjusted to the map of definite location filed in 1873, and was included in the indemnity withdrawal made following the filing of said map.

On August 12, 1878, the local officers permitted John Abrahamsen to make timber culture entry covering the NW. ¼ of said Sec. 29, and on September 17, 1878, Samuel J. Abrahamsen was permitted to make homestead entry for the NE. ¼ of said Sec. 29. From the record now before the Department, however, it appears that Abraham Abrahamsen testified that he is a brother of John Abrahamsen who made the timber culture entry, and that John Abrahamsen and Samuel J. Abrahamsen, who made the homestead entry before described, are one and the same person, and that he abandoned the land covered by said entries in the year 1879.

As soon as the entryman learned of the fact that said entries covered lands within the indemnity limits of the grant for said company, he filed separate petitions praying to be allowed to make new entries. These petitions were severally considered in your office letters of December 1, 1879, in each of which it was stated:

> I have deemed it proper to allow Mr. Abrahamsen to elect whether he will have his entry canceled in accordance with his request aforesaid, or allow it to remain intact awaiting the adjustment of the grant. He should be advised that he obtains no greater rights by allowing his entry to stand, simply being enabled to secure the tract in case it is not required in satisfaction of the grant. Should he conclude to have his entry canceled, he will, of course, be credited with the fees and commissions heretofore paid.

No response appears to have been made to the opportunity afforded the entryman to have his entries canceled or to permit them to stand awaiting the adjustment of the railroad grant.

Your office decision also states that the records show that on March 30, 1880, homestead entry was made in the name of Samuel J. Abrahamsen covering the SE. ¼ of Sec. 20, T. 148 N., R. 50 W., which entry was commuted to cash November 5, 1880.

From the above it would appear that Abrahamsen elected to abandon the entries allowed in conflict with the indemnity withdrawal made on account of the railroad grant, which withdrawal was, at the time of the making of said entries, recognized as sufficient to withhold the land from entry or disposition otherwise than the selection by the railroad company.

The effect of the action taken in your office letters of December 1, 1879, upon Abrahamsen's petitions, seems to have been to permit the entries to stand, subject to the company's selection of the tract, if the entryman so elected. On March 19, 1883, the company filed its indemnity list of selections covering this tract. No question is raised as to the formality of the selection or the sufficiency of the basis assigned therefor by the company.

In view of the fact that no response was made to your office letters of December 1, 1879, the entries were permitted to remain of record until by your office decision of October 15, 1890, the time within which to make proof thereon having in the mean time expired, the local officers were directed to give the entryman notice, under the circular of December 20, 1873, with the view of clearing the record of the expired entries.

The entries were not, however, finally canceled until January 4, 1895. In the mean time, however, to wit, on December 18, 1894, one Daniel C. Jacobs tendered a homestead application covering the NW. ¼ of said Sec. 29, and also applied to contest the timber culture entry of John Abrahamsen; and on the same day Adolph Bessie tendered homestead application for the NE. ¼ of said Sec. 29, accompanying the same with an affidavit of contest against the entry in the name of Samuel J. Abrahamsen. The local officers suspended action upon these several

applications pending the result of the proceedings taken by your office looking to the cancellation of the entries for expiration.

On January 2, 1895, Ole O. Olson also tendered homestead application for the NW. ¼ of said Sec. 29, alleging settlement thereon December 17, 1894; and on the same day John E. Lasham tendered homestead application for the NE. ¼ of Sec. 29, alleging settlement thereon December 18, 1894.

Following the cancellation of the entries by Abrahamsen on January 4, 1895, to wit, January 8, 1895, the local officers permitted Bessie and Jacobs to make homestead entries covering the NE. ¼ and NW. ¼ respectively, and rejected the applications by Olson and Lasham; from which action Jacobs and Bessie appealed to your office, petitioning for a hearing.

On April 12, 1895, Hugh Reed, on his own behalf, and O. S. Hanson, as trustee for Naomi Ramsden *et al.*, made joint applications to purchase said tracts under the fifth section of the act of March 3, 1887, and subsequently gave notice by publication of their intention to submit proof in support of their applications to purchase on June 19, 1895. Hearing was subsequently had, after due notice to all parties.

Upon the testimony adduced the local officers rendered disagreeing opinions, the register holding that the applications to purchase should be denied, and the receiver that they should be allowed.

Appeals were filed on behalf of Reed, Hanson, Olson and Jacobs, upon consideration of which your office rendered its decision of March 19, 1898, holding, as before stated, that the selection by the railroad company should be canceled, together with the entries by Bessie and Jacobs, and that the applications by Olson and Lasham should also be rejected and the right of purchase awarded to Reed and Hanson as applied for.

The homestead entrymen, Bessie and Jacobs, do not appear to have appealed from your office decision, and as to them said decision has become final, and their entries will be canceled upon the records.

The appeal by the company will first be considered, for if the same is sustained a consideration of the appeals by Olson and Lasham will be unnecessary.

From the above recitation it is apparent that while the tract here involved was, at the date of the presentation of the company's selection, on March 19, 1883, covered by the timber culture and homestead entries of Abrahamsen, yet said entries had, in fact, been abandoned, the entryman having petitioned for the restoration of his rights, which were conditionally allowed, and had at least exercised his homestead right elsewhere.

In consideration of the petitions for restoration of the rights of the entryman, your office, on December 1, 1879, in effect held the entries theretofore allowed subject to the company's right of selection, so that when its selection was presented, on March 19, 1883, the same was

properly allowed, and in effect worked a cancellation of the entries then of record.

No question is now raised as to any claim of right under these entries, for, as before stated, the record now before the Department shows that said entries have long since been abandoned and formally canceled from the records.

The company's selection having been properly allowed, was of record at the date of the presentation of the applications by Olson and Lasham, and they therefore gained nothing by the presentation of said applications as against the company's right under its selection. The rejection of their applications is, for that reason, affirmed.

If otherwise regular and legal, the company's selection will be submitted for approval, with a view to the issue of patent on account of the grant, and in the meantime action upon the application to purchase by Reed and Hanson will stand suspended.

PRACTICE—APPEAL—REHEARING—NOTICE—CHARGE.

BRIDGES *v.* BRIDGES.

The fact that an appeal is accompanied by a petition for a rehearing, as an alternative remedy, or that such a petition is subsequently filed, is no ground for holding that the appellant has thereby waived any right under his appeal, in the absence of an express waiver on his part.

Publication of notice is warranted on an affidavit that alleges the defendant to be a non-resident and shows that personal service can not be secured.

Mailing by registered letter a copy of the notice to the address of the defendant as appearing of record is compliance with rule 14 of practice.

The sufficiency of an information on which the local office has issued notice of contest is not a matter of review in the Department, as it is by notice the local office secures jurisdiction, and not by virtue of the information on which the citation issues.

The authority of the Land Department to entertain a contest is not abridged by the fact that the affidavit of contest is filed before the expiration of the period covered by the charge, if the notice is served after such period.

Secretary Bliss to the Commissioner of the General Land Office, December 6, 1898.

(W. V. D.) (J. L. McC.)

George W. Bridges, on October 21, 1891, made homestead entry for lots 1 and 2 and the S. ½ of the NE. ¼ of Sec. 2, T. 12 N., R. 6 E., Oklahoma City land district, O. T.

Susan E. Bridges, on December 20, 1895, filed contest affidavit, alleging abandonment.

Notice of contest (which embodied the allegations of the contest affidavit), was issued June 19, 1896, in the following language:

Complaint having been entered at this land office by Mrs. Susan E. Bridges, against George W. Bridges, who made homestead entry No. 1913, for lots 1 and 2 and the S. ½ of the NE. ¼ of Sec. 2, in T. 12 N. of R. 6 E., I. M., at this land office on October 21st, 1891, alleging that said George W. Bridges has wholly abandoned

said land for more than six months since making said entry, and next prior to the date herein; that said George W. Bridges was the husband of said contestant, Susan E. Bridges; that he has abandoned and deserted said Susan E. Bridges; and that she, the said contestant, is an actual settler and resident on said land, and has numerous and valuable improvements thereon; that said tract is not settled upon, and cultivated by said George W. Bridges as required by law; and that the defects herein alleged on the part of said George W. Bridges still exist;

On June 9, 1896, Mrs. Bridges filed affidavit of the non-residence of Mr. Bridges, and asked that notice be served by publication; and the local office so ordered.

Notice was published for four consecutive weeks (the first publication being on June 26, 1896,) in a newspaper of general circulation in the county in which the land is situated. A copy of the notice was posted in the local office (on June 19, 1896); a copy was posted in a conspicuous place on the land in controversy on June 24, 1896; and a copy was sent by registered letter addressed to George W. Bridges, at Choteau, Indian Territory—which, according to the record of his entry in the local office, was his "last known address."

At the date set for the hearing Susan E. Bridges appeared and submitted testimony tending to show the truth of her allegations of contest. George W. Bridges defaulted. The local officers found and recommended as follows:

> From the testimony presented it appears that the land embraced in said homestead entry, No. 1913, has been wholly abandoned by the entryman, since November, 1895; that the plaintiff herein is the deserted wife of the entryman, and has since been divorced from him on her own complaint. We are therefore of the opinion that said homestead entry, No. 1913, should be canceled.

From the above decision George W. Bridges appealed to your office, which, on April 23, 1897, rendered a decision affirming that of the local officers, and holding George W. Bridges' entry for cancellation.

The facts of the case, as shown at the hearing, are summed up in said office decision as follows:

> It appears that George W. Bridges lived on the tract in dispute, with his family, for three years; but left on November 22, 1895, and had not been back, except for an hour in January, 1896, up to the date of hearing, August 10, 1896; that Susan E. Stone, formerly Susan E. Bridges, has remained on said tract with her four children continuously; that the tract is fenced with wire, having, besides two small log houses, a barn, two wells, and about sixty acres in cultivation. A certified copy of the decree of divorce in the case of Susan E. Bridges *v.* George W. Bridges, at the April 14, 1896, term of district court, Lincoln county, Okla., was introduced at the hearing as an exhibit.

From said decision of your office George W. Bridges, on May 31, 1897, filed an appeal to the Department. Said appeal contains fifteen specifications; in substance, that said decision was in error in holding the allegations of the contest affidavit to be sufficient to warrant a hearing; in holding that said contest was not prematurely brought; in holding that jurisdiction over the defendant had been obtained, when the notice was sent to him at Choteau, Indian Territory, although his

"last known" post-office address was Arlington; and in not remanding said case to the local office for a re-hearing.

On October 25, 1898, said defendant filed in the Department a petition for the exercise of the supervisory authority of the Secretary, asking him to order a re-hearing in said case. In said petition he sets forth that he has made certain valuable improvements upon the tract in controversy; that his wife, the contestant, entered upon a persistent system of persecution in order to drive him from the land; that when he left, during his absence she, without his knowledge, obtained a decree of divorce; that he was only temporarily absent on business, with no intention of abandoning the land; that he never had any notice of said contest proceedings, nor actual knowledge thereof, until after the trial of the case, and sometime about the 22nd of September, 1896; that he has never changed his residence from said land, nor established a home elsewhere, nor been a non-resident of Oklahoma since 1891.

Counsel for Mrs. Bridges has filed a motion to dismiss the appeal, on the ground that the appellant had waived the same by filing said petition for a rehearing.

This motion can not be granted. The fact that an appeal is accompanied by a petition for a rehearing as an alternative remedy, or that a petition for rehearing is subsequently filed, is no ground for holding that the appellant has waived any rights he may have had under his appeal, in the absence of an express waiver on his part.

Inasmuch as the appeal and the petition for a rehearing cover substantially the same grounds, the questions raised therein will be considered together.

The defendant contends that service was "fatally defective"; a point more clearly set forth in his appeal from the local office to your office, in which he alleges that the local officers erred "in permitting service by publication to be made on the showing made by the contestant, there being no showing or other evidence of any attempt or failure of the contestant to make personal service."

The affidavit upon which publication was ordered alleged:

> That personal service cannot be made upon the defendant herein, George W. Bridges, for the reason that he is a non-resident of the Territory of Oklahoma, and is absent therefrom; that said George W. Bridges is a fugitive from justice, and so conceals himself that service of this notice can not be made upon him, and is somewhere in the Indian Territory, as well as your affiant is informed.

The local officers accepted this affidavit as sufficient; and no reason appears why their action in this respect should be disturbed.

It is true, the defendant contends that he was at the date of publication of notice a resident of Oklahoma, and of the tract in controversy. But from the affidavits filed in support of the petition for a rehearing he in effect admits that he was not in Oklahoma Territory, but in the Creek country, in Oklahoma, dealing in horses, during the fall of 1895, and nearly all the time afterward. He only claims to have returned to the land in controversy once in January, 1896; once in March; once in

May; once in July; and again in August or September, 1896. It does not appear from the showing made that Mrs. Bridges could have served him personally, or that her affidavit setting forth that he was a non-resident of the Territory was not justified.

The defendant further alleges that your office decision erred in holding that notice by registered letter was properly addressed to him at Choteau, Indian Territory, when in fact "his post office address had been for three years next prior to the filing of contest at Arlington, Oklahoma." Several affidavits are filed in which the affiants allege that the defendant's "last known address" was at Arlington.

Rule 14 of Practice provides that "a copy of the notice shall be mailed by registered letter to the last known address" of the person to be notified. It appears in this case that the notice was sent by registered mail to the post office address of the defendant shown by the record of his homestead application and entry in the local office. It does not appear that he ever authorized a change of that record address, or that the same was ever changed, and it must therefore be held that the notice given was in compliance with the rule.

It is further alleged that your office was in error—

In holding that when an affidavit of contest fails to charge a cause of action, the defect can be corrected and supplied by the notice of contest, charging a cause of action when the affidavit of contest did not so charge a cause of action.

In his argument in support of his appeal the defendant explains that this refers to the fact that the contest affidavit does not aver that abandonment had existed for six months prior to the date of filing the contest affidavit, while the printed notice of subsequent date (the first publication being on June 26, 1896) notifies the defendant that he is charged with having

abandoned said land for more than six months since making said entry; . . . that said tract is not settled upon and cultivated by said George W. Bridges as required by law; and that the defaults herein alleged on the part of the said George W. Bridges still exist.

The above allegation is not sustained by the rulings of the Department. In the case of Houston *v.* Coyle (2 L. D., 58), it said:

Any question involving the sufficiency of information on which the local office elected to proceed disappears from the moment that notice is issued to the settler. It is by notice to the homestead settler that jurisdiction is acquired, and not by virtue of any affidavit on which such citation was issued; and this Department will not here review the sufficiency of the information.

Substantially the same objection in another form is raised in the allegation that the contest was prematurely brought, "when the affidavit of contest was filed in December, 1895, and the proof showed the entryman to have resided continuously on said tract until November, 1895."

The first publication of notice was made (*supra*) June 26, 1896. The Department has repeatedly held, as in the case of Seitz *v.* Wallace, syllabus (6 L. D., 299):

As the affidavit of contest is only in the nature of an information, and not essential to a contest, and jurisdiction is acquired by service of notice, and not by the

contest affidavit, the authority of the Land Department to entertain a contest is not abridged by the fact that the affidavit of contest was filed before the expiration of the period covered by the charge, where the notice was served after such period.

To the same effect see McClellan *v.* Crane *et al.* (13 L. D., 258).

It is further contended that your office decision erred in permitting to be introduced at the hearing a copy of a decree of divorce granted Susan E. Bridges, and in considering the same as evidence, inasmuch as the decree of divorce showed that her husband, George W. Bridges "was a habitual drunkard," and "was cruel to contestant," but did not show that he had abandoned the land in controversy.

The appellant would appear to have misapprehended the purpose for which a copy of said decree of divorce was introduced—which was not to show that Mr. Bridges had abandoned the land, but that his wife had obtained a divorce from him, and therefore had a legal right to bring contest against him.

The remainder of the fifteen specifications of error upon which the appeal is based allege in substance that the defendant has been deprived of his property without having been afforded an opportunity to be heard in defense of his entry; but as has already been shown herein, there is no just ground for such allegation.

The decision of your office in holding said entry for cancellation is affirmed.

HOMESTEAD CONTEST—APPLICATION TO ENTER—SETTLEMENT RIGHT.

PRYOR ET AL. *v.* COUCH.

A contestant against a homestead entry is not required to file an application to enter at the time of initiating contest, but if he does so, and omits therefrom a portion of the land covered by the entry under attack, a subsequent settler, who, without protest on the part of the contestant, establishes his residence on the tract so omitted, will be protected as against the preferred right of the contestant to enter all the land involved in his contest.

Secretary Bliss to the Commissioner of the General Land Office, December 6, 1898.

(W. V. D.) (W. A. E.)

A petition for the exercise of the supervisory power vested in the Secretary of the Interior has been filed by David C. Pryor, one of the contestants in the case of David C. Pryor et al. *v.* John M. Couch, involving the latter's homestead entry, made April 25, 1889, for lots 1, 2, 3, 7, 8, and 9, fractional parts of the NE. ¼ of Sec. 9, T. 11 N., R. 3 W., Oklahoma, Oklahoma, land district.

Contests against Couch's entry were filed by David C. Pryor, Jerome Monk, James A. Robinson, James Thompson, Hugh L. Ewing, and Joseph England. Some of the contest affidavits contained only the charge of disqualification, while others contained the additional allegation of prior settlement. Pryor, the first contestant, alleged only the disqualification of the entryman.

To save time and expense and possible confusion in case one of the later contestants should prove to be the prior settler, these several contests were consolidated by order of your office and a hearing was had at which all parties were heard.

After various actions and decisions by the local office and your office, the case came on appeal before the Department, which, by decision of December 11, 1897 (25 L. D., 488), affirmed your office decision holding Couch's entry for cancellation on the ground that he was disqualified. It was not found that any of the contestants was the prior settler and the Department declined to consider, at that time, any questions as to their preference right of entry.

Motion for review of this decision, so far as it refused to consider the question of preference right of entry, was filed by Joseph England, one of the contestants, and on consideration thereof (27 L. D., 30) the former decision of the Department was modified and it was held that Pryor was estopped as against England from entering lots 1, 2, 3 and 7; that as to those lots England had the better right; and that Pryor's preference right was absolute as to lots 8 and 9 and good as to the remaining lots against every one but England.

The petition for exercise of supervisory power filed by Pryor presents practically the same questions that were considered on England's motion for review, but as it appears that Pryor's argument on the motion for review did not reach the Department until after decision had been rendered on the motion, the present petition will be considered and disposed of on its merits.

All the parties to this contest, except Pryor and England, have been eliminated at one stage or another of the proceedings and the only thing to be considered now is whether Pryor is estopped, as against England, from entering any portion of the tract in controversy.

It appears that when Pryor filed his contest affidavit he only asked that Couch's entry be canceled as to lots 8 and 9. With this contest affidavit he filed a formal application to make homestead entry for said lots 8 and 9. At this time England was residing upon and claiming lots 1, 2, 3, and 7, and soon thereafter instituted a contest against Couch's entry, from which contest lots 8 and 9 sought by Pryor were eliminated by England's disclaimer. It was not until after the hearing in the local office that Pryor determined, in case his contest was ultimately successful, that he would apply for and claim the entire tract covered by Couch's entry.

England's settlement and improvement of lots 1, 2, 3, and 7, began about a month after the date of Couch's entry and he has since continuously resided upon and claimed those lots. Pryor, it appears, knew of England's settlement and claim, but made no protest and asserted no claim to lots 1, 2, 3, and 7, until after the consolidation of the contests and the hearing thereon in the local office.

In the decision of the Department on England's motion for review,

it was held, in effect, that a contestant who at the time of initiating a contest against an entry, clearly manifests an intention, if successful in the contest, to enter only a part of the land covered by such entry, and who, without objection, permits an existing settler upon the remaining part of the land to occupy and improve the same and to institute and prosecute a contest against the entry with a view to freeing therefrom and subsequently acquiring, under the homestead law, the land embraced in his settlement, will be estopped from asserting against such settler a preference right to enter the land embraced in the latter's settlement.

Pryor claims, in his petition, that the several contests against Couch's entry were improperly consolidated and therefore England has no standing before the Department; that England's settlement, being made while the land was covered by Couch's entry, could avail him nothing, he being merely in the position of a trespasser; and that the question of estoppel was not properly pleaded.

As stated above, some of the contests against Couch's entry contained the allegation of prior settlement. Clearly, these contests should not have been suspended to await the termination of Pryor's contest, which contained only the charge of disqualification. On the other hand, it would not have been proper to subordinate Pryor's contest, the first one filed, to any later contest. The only equitable course to pursue, therefore, was to consolidate the several contests and give each party an opportunity to support his claim. There was no injustice to Pryor in this.

In regard to England's settlement, it is true that this settlement conferred no right upon him as against the entryman or the government. It is not necessary to cite authorities in support of this proposition. The Department has held in a number of cases, however, that priority of settlement may be considered as between settlers on land covered by the subsisting entry or appropriation of another. While Pryor does not allege settlement, yet he claims by virtue of his contest against Couch's entry, and under the circumstances of this case England's settlement may be properly considered as against him.

As to the manner in which the question of estoppel was raised, it may be said that there are no formal pleadings under the land office practice. The Secretary of the Interior is charged with the administration of the public land laws and in the endeavor to reach an equitable conclusion in a particular case he may take into consideration any questions that arise during the progress of the case without regard to the manner in which they were brought before him.

The attorneys for Pryor attempt, in their argument on the petition, to draw a distinction between this case and the case of Enos *v.* Fagan (13 L. D., 283), cited in support of departmental decision of June 4, 1898. In the case cited, Enos filed simultaneous affidavits of contest against a homestead entry and a timber culture entry and prosecuted

both contests to a successful termination. At the time he instituted these contests he filed his timber culture application for the land covered by the timber culture entry he was contesting. Subsequently Fagan settled upon and began improving the homestead tract. Enos knew of this settlement, but stood by and made no protest. When the two entries were canceled Fagan filed preemption declaratory statement for the tract upon which he was living and Enos (who had previously exhausted his rights under the preemption and homestead laws) changed his timber culture application over to the same tract. It was held by the Department that Enos was estopped as against Fagan from making timber culture entry for the land upon which Fagan was residing. It is urged by the attorneys for Pryor that the regulations of the Department required Enos to file his timber culture application at the time of instituting contest and that such application was, therefore, a formal and valid selection which could not be changed in the presence of an adverse claim, but that Pryor was not required to file his homestead application at the time he instituted contest and consequently his application filed at that time was a mere nullity which in no way bound him or affected his right.

It is true that Pryor was not required, at the time of initiating contest, to file an application to enter, but the fact remains that he did file such an application; that this application covered lots 8 and 9; that he thereby formally placed himself on record as claiming only lots 8 and 9; and that not until recently has he indicated an intention to apply for the remaining lots, upon which England has been living. Whatever may have been Pryor's object in filing his application for lots 8 and 9 at the time he initiated contest, it would be unjust to England, who had a right to rely upon Pryor's formal declaration, to now allow Pryor to make entry not only for lots 8 and 9, but also for the lots which England has resided upon and improved without a word of protest from Pryor.

No valid reason being shown why departmental decision of June 4, 1898, should be modified or revoked, the present petition is hereby denied.

MINING CLAIM—LODE WITHIN PLACER—PATENT.

ALICE MINING COMPANY.

When it is duly ascertained that a lode, alleged to have been known to exist within the boundaries of a placer claim at the date of application for patent therefor, was not known to so exist, it must be held that the title of the United States to such lode passed under the patent, and that the jurisdiction of the Land Department was thereby terminated.

Secretary Bliss to the Commissioner of the General Land Office, December 7, 1898.

(W. V. D.) (E. B., Jr.)

The Alice Mining Company, applicant for patent to the Clio, Clio No. One, and Clio No. Two, lode claims, survey No. 6324, Denver, Col-

orado, mineral entry No. 143, made May 16, 1896, has appealed from the decisions of your office dated November 5, 1896, and June 1, 1897, the latter on review, holding the said entry for cancellation.

It appears that the said lode claims lie wholly within the boundaries of the G. B. Harris placer, survey No. 1426; that the said company filed its application for patent to this placer November 29, 1881, made entry thereof February 28, 1882, and received patent therefor April 22, 1886; that the placer application did not contain any statement that the placer contained a vein or lode within its boundaries; and that the applicant made the usual proof of the non-existence of any vein or lode within such boundaries.

March 13, 1890, one Claud E. Street filed application for patent to the said lode claims, alleging possessory right thereto under locations made January 18, 1890. May 7, 1890, during the period of publication of notice of Street's application, the said company filed its adverse claim, commenced suit May 10, following, in support thereof, to recover possession of the premises embraced in survey No. 6324, and on July 11, 1892, was awarded the possession by judgment of the court. April 3, 1896, the company filed a duly certified copy of the said judgment in the local office, on May 16, following, applied to purchase, and the same day was allowed to purchase and make entry of the land covered by said lode claims,

Under section 2333 Revised Statutes, a placer patent conveys title to all lodes within the placer boundaries, not known to exist at the date of the placer application, but lodes therein known to exist at such date and not claimed in the placer application are expressly excluded from the placer patent. The transcript of proceedings in the said suit clearly show that the question whether the Clio, Clio No. One and Clio No. Two lodes were known at the date of the filing of the placer application was in issue in said suit and that the judgment of the court was based upon a finding in the negative. Your office accepted this finding as sufficient proof that at date of the placer application the said lodes were not known to exist, and held that the title of the United States to the land in question passed under the placer patent, and that the jurisdiction of the land department was thereby terminated, and so, as above stated, held the company's entry for cancellation. The contention of the appellant, the placer patentee, is, curiously enough, that these lodes were known to exist at the date of its application for the placer patent, and therefore did not pass under the patent, and that the land department still has jurisdiction of the land embraced in survey No. 6324 and should issue patent upon its said entry of May 16, 1896.

The Department finds no reason to dissent from the conclusion reached by your office. In the case of South Star Lode (20 L. D., 204) it was held:

When it is ascertained by inquiry instituted by the Department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of

the land covered by a placer patent, and that such lode claim was known to exist at the date of the application for such patent, and was not applied for, it must be held that the land embraced in said lode is reserved from the operation of the conveyance by the general terms of exception therein, and that patent may issue therefor, if the law has been in other respects fully complied with.

The converse of this doctrine is equally true. When it is duly ascertained that a lode alleged to have been known to exist within the placer boundaries at the date of the application for patent to the placer claim, was not known so to exist, it must be held that the title of the United States to such lode passed under the patent and that the jurisdiction of the land department was thereby terminated.

The entry in question was evidently allowed by the local office in the belief that the said judgment is one within the purview of section 2326 Revised Statutes. This is a matter, however, which is not discussed or passed upon in your office decisions, nor does the appeal make any allusion thereto. The land department having accepted said judgment as sufficient proof that the said lodes were not known to exist at date of the placer application, and it following thereunder, by virtue of the provisions of section 2333 Revised Statutes, that the title to the land in question passed under the placer patent, and that the jurisdiction of the land department is thereby terminated, any further consideration of the effect of said judgment upon the rights of the parties to that suit is unnecessary, at least, if not precluded. The question of jurisdiction being settled in the negative, the land department is without further concern in the land or the judgment of the court respecting the same.

The decisions of your office are accordingly affirmed.

REGULATIONS CONCERNING RIGHT-OF-WAY RAILROADS.

The following is a copy of an act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States:"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the

crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act [to amend an act entitled an act] to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875. (18 Stat., p. 482.)

1. The grant made by this act does not convey an estate in fee in the lands used for right of way or for station grounds. The grant is merely of a right of use for the necessary and legitimate purposes of the roads, the fee remaining in the United States.

2. All persons entering public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as a part of the area of the tract entered.

3. Whenever any right of way shall pass over private land or possessory claims on lands of the United States, condemnation of the right of way across the same may be made in accordance with the provisions of section 3 of the act.

4. Lines of route or station grounds lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see paragraphs 17 and 18.)

5. Any railroad company desiring to obtain the benefits of the law is required to file, through this office, or they may be filed with the register of the land district in which the principal terminus of the road is to be located, who will forward them to this office—

First. A copy of its articles of incorporation, duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same is the existing law.

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of the State or Territory is required that it has complied with the laws of that State or Territory governing foreign corporations, to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law. (Form 1, p. 9.)

Sixth. An affidavit by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2, p. 9.)

Seventh. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

6. The word profile as used in this act is understood to intend a map of alignment. All such maps and plats of station grounds are required by the act to be filed with the register of the land office for the district where the land is located. They must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of the station grounds.

7. The maps should show any other road crossed, or with which connection is made; and whenever possible the station number on the survey thereof at the point of intersection. All such intersecting roads

must be represented in ink of a different color from that used for the line for which the applicant asks right of way. Field notes of the surveys should be written along the line on the map. If the map would thereby be too much crowded to be easily read, then duplicate field notes should be filed separate from the map, and in such form that they may be folded for filing. In such case it will be necessary to place on the map only a sufficient number of station numbers to make it convenient to follow the field notes on the map. In all cases station numbers should be given on the map where changes of numbering occur and where the lines of the public surveys are crossed, with distances to the nearest existing corner. The map must also show the lines of reference of initial and terminal points, with their courses and distances.

8. Typewritten field notes, with clear carbon copies, are preferred whenever separate field notes are necessary, as they expedite the examination of applications. The field notes, whether given on the map or filed separately, must be so complete that the line may be retraced from them on the ground. They should show whether lines were run on true or magnetic bearings; and in the latter case the variation of the needle and date of determination must be stated. One or more bearings (or angular connections with public survey lines) must be given. The 10-mile sections must be indicated and numbered on all lines of road submitted.

9. The scale of maps showing the line of route should be 2,000 feet to an inch. The maps may, however, be drawn to a larger scale when necessary; but the scale must not be so greatly increased as to make the map inconveniently large for handling. In most cases, by furnishing separate field notes an increase of scale can be avoided. Plats of station grounds should be drawn on a scale of 400 feet to an inch, and must be filed separately from the line of route. Such plats should show enough of the line of route to indicate the position of the tract with reference thereto.

10. All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way the smallest legal subdivisions (40 acre tracts and lots) must be shown.

11. The applicant should mark each of the subdivisions affected by the right of way "V" or "Vacant" if it belongs to the public domain at the time of filing the map in the local land office; and the same must be verified by the certificate of the register. If it does not affirmatively appear that some portion of the public land is affected, the local officers will refuse to receive the maps. (See paragraph 22.)

12. The termini of the line of road should be fixed by reference of course and distance to the nearest existing corner of the public survey. The map, engineer's affidavit, and president's certificate (Forms 3 and 4, pp. 9, 10) should each show these connections. The company must certify in Form 4 that the road is to be operated as a common carrier of passengers and freight. A tract for station grounds must be simi-

larly referenced and described on the plat and in Forms 7 and 8 (p. 11), except when the tract conforms to the subdivisions of the public surveys, in which case it may be described in the forms according to the subdivisions.

13. When either terminal of the line of route is upon unsurveyed land it must be connected by traverse with an established corner of the public survey, if not more than 6 miles distant from it, and the single bearing and distance from the terminal point to the corner computed, and noted on the map, in the engineer's affidavit, and in the president's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given.

14. When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized, and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark, and course and distance to the terminus. There must be given an accurate description of the mark and full data of the traverse, as required above. The engineer's affidavit and president's certificate (Forms 3 and 4) must state the connections. These monuments are of great importance.

15. When the line of route lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately stated in Forms 3 and 4, by connection of termini and length, as though each portion were independent.

16. When lands desired for station grounds lie partly on unsurveyed land, the areas of the several parts on surveyed and unsurveyed land must be separately stated on the map and in Forms 7 and 8.

17. Maps or plats of lines of route or station grounds lying wholly on unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same is situated, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps or plats will not dispense with the filing of maps or plats after the survey of the lands and within the time limited in the act granting the right of way, which map or plat, if in all respects regular when filed, will receive the Secretary's approval.

18. In filing such maps or plats the initial and terminal points will be fixed as indicated in paragraphs 13 and 14.

19. Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. The map or plat should show these distances and the station numbers at the points of intersection. When field notes are submitted, they should also contain these distances and station numbers.

20. The engineer's affidavit and president's certificate must be written on the map, and must both designate by termini and length, in miles and decimals, the line of route for which right of way application is made (see Forms 3 and 4, pp. 9, 10). Station grounds must be described by initial point and area in acres (see Forms 7 and 8, p. 11); and when they are on surveyed land the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein (see paragraph 12).

21. Where right of way is desired for spurs or short branch lines which will not greatly enlarge the size of the map, they may be shown on the same map with the main line, and should be separately described in the forms by termini and length. For longer branch lines separate maps should be filed.

22. When the maps are filed the local officers will note in pencil on the tract books opposite each vacant tract traversed, that right of way for a railroad or station grounds is pending, giving date of filing and name of company, noting on each map or plat the date of filing, over their written signature, transmitting them promptly to the General Land Office. (See paragraph 11.)

23. Upon the approval of a map of location by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will mark upon the township plats the line of the railroad or location of station grounds, as laid down on the map or plat. They will also note, in ink, on the tract books, opposite each tract marked as required by paragraph 22, that the same is to be disposed of subject to the right of way for the railroad company's line of road or station grounds.

24. When the railroad is constructed, an affidavit of the engineer and certificate of the president (Forms 5 and 6, p. 10) must be filed in the local office, in duplicate, for transmission to this office. No new map will be required, except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the honorable Secretary.

BINGER HERMANN,
Commissioner of the General Land Office.

Approved November 4, 1898.

C. N. BLISS,
Secretary of the Interior.

Forms for due proofs, and verification of maps of right of way for railroads.

FORM 1.

I, ——— ———, secretary (or president) of the ——— company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of ———; and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL OF COMPANY.]

——— ———,
——— of the ——— Company.

FORM 2.

STATE OF ———,
County of ———, *ss:*

——— ———, being duly sworn, says that he is the president of the ——— company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

[SEAL OF COMPANY.]

——— ———,
President of Company.

Sworn and subscribed to before me this —— day of ———, 189—.

[SEAL.]

——— ———,
Notary Public.

FORM 3.

STATE OF ———,
County of ———, *ss:*

——— ———, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the ——— company; that the survey of the said company's line of railroad described as follows: (here describe the line of route as required by paragraph 12), a length of ——— miles, was made by him (or under his direction) as chief engineer of (or as surveyor employed by) the company and under its authority, commencing on the —— day of ———, 189—, and ending on the —— day of ———, 189—; and that the survey of the said line is accurately represented on this map and by the accompanying field notes.

——— ———,
——— ———.

Sworn and subscribed to before me this —— day of ———, 189—.

[SEAL.]

——— ———,
Notary Public.

FORM 4.

I, ——— ———, do hereby certify that I am president of the ——— company; that ——— ———, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said railroad, as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said railroad upon the location shown upon this map; that the said survey as represented on this map and by said field notes was adopted by resolution of its board of directors on the —— day of ———, 189—, as the definite location of the said railroad, described as follows: (describe as in Form 3); and that this map has been prepared to be filed in order to obtain the benefits of the act of Congress approved March 3, 1875, entitled "An act

granting to railroads the right of way through the public lands of the United States." I further certify that the said railroad is to be operated as a common carrier of passengers and freight.

——— ———,

President of the ——— Company.

Attest:

[SEAL OF COMPANY.] ——— ———, *Secretary.*

FORM 5.

STATE OF ———,

County of ———, *ss:*

——— ———, being duly sworn, says that he is the chief engineer of (or was employed to construct) the railroad of the ——— company; that said railroad has been constructed under his supervision, as follows: (describe as in paragraph 12) a total length of ——— miles; that construction was commenced on the —— day of ———, 189—, and completed on the —— day of ———, 189—; and that the constructed railroad conforms to the map and field notes which received the approval of the Secretary of the Interior on the —— day of ———, 189—.

——— ———,

——— ———.

Sworn and subscribed to before me this —— day of ———, 189—.

[SEAL.] ——— ———,

Notary Public.

FORM 6.

I, ——— ———, do hereby certify that I am the president of the ——— company; that the railroad described as follows: (describe as in Form 5) was actually constructed as set forth in the accompanying affidavit of ——— ———, chief engineer (or the person employed by the company in the premises); that the location of the constructed railroad conforms to the map and field notes approved by the Secretary of the Interior on the —— day of ———, 189—; and that the company has in all things complied with the requirements of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

——— ———,

President of the ——— Company.

Attest:

[SEAL OF COMPANY.] ——— ———, *Secretary.*

FORM 7.

STATE OF ———.

County of ———, *ss:*

——— ———, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the ——— company; that the survey of the tract described as follows: (here describe as required by paragraph 12) an area of ——— acres, and no more, was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company), and under its authority, commencing on the —— day of ———, 189—, and ending on the —— day of ———, 189—; that the survey of the said tract is accurately represented on this plat and by the accompanying field notes; that the company has occupied no other grounds for similar purposes upon public lands within the section of 10 miles, from the —— mile to the —— mile, for which this selection is made; that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

——— ———,

——— ———.

Subscribed and sworn to before me this —— day of ———, 189—.

[SEAL.] ——— ———,

Notary Public.

FORM 8.

I, ——— ———, do hereby certify that I am president of the ——— company; that ——— ———, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the tract described as follows: (here describe as in Form 7) an area of ——— acres, and no more, was made under authority of the company; that the said survey, as represented on this map and by said field notes, was adopted by resolution of its board on the —— day of ———, 189—, as the definite location of said tract for station grounds; that the company has occupied no other grounds for similar purposes upon public lands within the section of 10 miles, from the —— mile to the —— mile, for which this selection is made; that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

——— ———,
President of the ——— Company.

Attest:
[SEAL OF COMPANY.] ——— ———,
Secretary.

HOMESTEAD ENTRY—PATENT—WIDOW.

EUNICE ZIMMERMAN.

If a homesteader dies, before he is entitled to a final certificate, his widow succeeds to the homestead right, and may submit final proof and receive patent in her own name; and a patent issued in the name of the homesteader, on proof so made, is in violation of law, and no bar to the issuance of patent in the name of the widow.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 7, 1898.* (E. B., Jr.)

This is an appeal by Eunice Zimmerman, as widow of Josiah Zimmerman, from the decision of your office, dated July 14, 1897, refusing to cancel the patent issued July 6, 1896, to Josiah Zimmerman, her husband, for the SW. ¼ of the NE. ¼ of Sec. 19, T. 35 N., R. 9 W., of New Mexico Meridian, Durango, Colorado, land district, and to issue in lieu thereof patent to her as such widow. Said decision holds in effect that the land department is without jurisdiction to issue patent to Mrs. Zimmerman, for the reason that the patent already issued divested the United States of all right and title in and to the land described therein, and, furthermore, that "the rights of the parties entitled under the law . . . are fully protected by this patent."

Josiah Zimmerman initiated his claim to the above described land by homestead entry thereof November 14, 1892. He served in the army of the United States two years, five months and two days, during the war of the rebellion, and was therefore entitled to a deduction of that time (Section 2305 R. S.) from the period of five years of residence and cultivation otherwise required by section 2291, Revised Statutes. This left a period of nearly two years and seven months which must elapse

after his entry before he could make final proof and receive a certificate entitling him to patent. He died February 11, 1895, before he was entitled to offer such proof. His widow, the said Eunice Zimmerman, duly offered final proof and received a certificate December 31, 1895, entitling her to patent in her own name as the widow of the entryman. This certificate, by direction of your office dated May 26, 1896, was changed by the local office so as to provide for the issue of patent to Josiah Zimmerman, instead of his widow, and patent issued thereupon as already stated. Relative to the issue of homestead patent, section 2291 Revised Statutes provides:

> No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they, will bear true allegiance to the government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

It is contended by appellant that in view of the facts shown in this case the law casts the right to patent upon her and her alone, and that the issue of patent in the name of Josiah Zimmerman, a person not in existence, was without authority of law, and that such patent is therefore void, and did not divest the United States of title to the land. She has therefore returned the patent to your office, and asks its cancellation and the issue of patent for the land in her own name. The patent issued to Josiah Zimmerman has not been placed of record except in your office.

At common law a conveyance to a deceased person is inoperative and void; and this is just as true where the instrument is a government patent as where it is a private deed. By section 2448, Revised Statutes, however, the common law rule is so modified that—

> Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

But this provision of law applies only in cases where the right to patent accrues prior to the death of the entryman. (Henry E. Stich, 23 L. D., 457.) Where the entryman dies, as in the case at bar, before the right exists to receive the certificate for a patent, his widow succeeds to the homestead right. She is entitled, at the proper time, to make final proof and receive the certificate upon which patent issues. Under the facts and the law of this case there was not only no authority for the change in the certificate and the issue of patent in the name

of the deceased entryman, but such change and such issue were in direct contravention of the statute. The homestead law required the issue of patent to Mrs. Zimmerman, the widow, and to her alone. As purporting to convey the title of the United States the patent issued to Josiah Zimmerman is a nullity, and the land department still has jurisdiction to issue patent to the person rightly entitled thereto (Anna Anderson, 26 L. D., 242; and Charles H. Moore, 27 L. D., 481.)

The decision of your office is therefore reversed and you will issue patent to Eunice Zimmerman, widow of Josiah Zimmerman. You will make appropriate notation upon the patent heretofore issued and upon the record thereof in your office.

PRACTICE—DEFECTIVE NOTICE.

SWENDSON *v.* ERICKSON.

A notice of contest will not be held defective for want of certainty as to the day fixed for trial, where it is apparent that the alleged defect did not operate to the prejudice of the defendant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 10, 1898.* (J. L. McC.)

Victor Erickson, on October 20, 1893, made homestead entry for the E. ½ of the NW. ¼ and the SW. ¼ of the NW. ¼ of Sec. 12, T. 45 N., R. 26 W., St. Cloud land district, Minnesota.

Sivert Swendson filed contest, dated June 15, 1896, alleging abandonment.

A hearing was had, at which the defendant did not appear. Testimony was taken on the part of the contestant which showed that the entryman had failed to reside upon, cultivate or improve the tract as required by law. Thereupon the local officers recommended that the entry be canceled; and on appeal your office held it for cancellation.

The defendant has appealed to the Department, alleging, in substance, that no legal notice had been served upon the defendant.

The original notice, a copy of which was served upon the defendant, reads in part as follows:

Said parties are hereby summoned to appear before the clerk of the District Court of Aitkin County, Minnesota, at Aitkin, Minnesota, on the 6th day of Aug., 1896, at 10 o'clock, A. M., to respond and furnish testimony concerning said abandonment. Further notice is hereby given that the hearing will be had at this office, on the 13th day of Aug., 189 , at 10 o'clock, A. M., when the testimony taken as ordered herein will be examined and a decision rendered thereupon.

In the printed form of notice, which was properly filled out in other respects, the figures "189 " were printed, but the final figure of the year was not written in the last of the two blank spaces left therefor. The natural and almost necessary inference, however, would be that the 13th day of August, on which the hearing was to be had at the local

office, was in the same year with the hearing that was to take place at Aitkin on the 6th of August, 1896. There can be no reasonable doubt that the defendant understood perfectly that it was in the year 1896, and no other, that the hearing was to be had before the local office. It must be held that the notice was sufficient.

The testimony taken at the hearing clearly showed a failure on the part of the entryman to comply with the law as to residence, cultivation, and improvement. The decision is therefore affirmed.

RAILROAD GRANT—CONFLICTING LIMITS—WITHDRAWAL.

NORTHERN PACIFIC R. R. CO. *v.* ST. PAUL MINNEAPOLIS AND MANITOBA RY. CO. ET AL.

As to lands within the indemnity limits of the Northern Pacific and the primary limits of the St. Vincent extension, there was no reservation for the benefit of the first named company, outside the withdrawal on general route, that would defeat the operation of the St. Vincent grant at the time it became effective.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 10, 1898.* (F. W. C.)

An appeal has been filed on behalf of the Northern Pacific Railroad Company from your office decision of February 2, 1897, sustaining the action of the local officers in rejecting its proffered indemnity selection of the SW. ¼ of the SE. ¼ of Sec. 27, T. 128 N., R. 35 W., and the E. ½ of the SW. ¼ of Sec. 5, T. 130 N., R. 41 W., St. Cloud land district, Minnesota.

The above described tracts are within the forty-mile limits, or second indemnity belt, of the grant for said company and were included in the list of selections, No. 54, rejected by the local officers on February 9, 1895.

The tracts above described are also within the primary limits of the grant made by the act of March 3, 1871, to aid in the construction of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway, the rights under which grant attached upon the definite location of the road December 19, 1871.

The first described tract was listed on account of the St. Vincent grant August 9, 1880, it appearing by the records to be free from adverse claim at the date of the attachment of rights under said grant. Your office decision therefore holds that the right under said grant attached to this tract and that it was thereafter not subject to the proffered selection by the Northern Racific Railroad Company on February 9, 1895.

In its appeal the Northern Pacific Railroad Company urges that you erred in rejecting its proffered selection of this tract for conflict with the claim made on account of the grant of 1871 to aid in the construction of the St. Vincent Extension of the St. Paul, Minneapolis and

Manitoba Railway, "as its definite location was subsequent to the attachment of the rights of the Northern Pacific Company."

It has been repeatedly ruled by this Department and the courts that no right attaches within the indemnity limits of a railroad grant prior to selection. It is presumed, however, that the contention made herein is similar to that advanced by said company in the case of Grunewald *et al. v.* Northern Pacific R. R. Co. *et al.* (24 L. D., 195). In that case it was urged by the Northern Pacific Railroad Company that the respective rights of these two companies within their conflicting grants was determined by the supreme court in the case reported in 139 U. S., page 1, in favor of the Northern Pacific Railroad Company. The land involved in the Grunewald case, like the tract here in question, was not included within the limits of the withdrawal made upon the map of general route filed by the Northern Pacific Railroad Company in 1870, and it was held that, as there was no reservation of lands for the benefit of the Northern Pacific Railroad Company outside the withdrawal on general route and the primary limits of its grant adjusted to the map of definite location filed on November 20, 1871, there was no such claim to this land on account of the Northern Pacific grant at the date of the filing of the map of definite location on account of the St. Vincent grant as would prevent the attachment of rights under said St. Vincent grant.

The decision in that case is controlling in the case now under consideration, and the rejection of the proffered selection of said tract by the Northern Pacific Railroad Company is accordingly affirmed.

Relative to the E. ½ of the SW. ¼ of Sec. 5, T. 130 N., R. 41 W., while it would appear from your office decision that the status of said tract, as regards the conflict between the two grants, is the same, it further appears that on July 30, 1895, the listing of said tract by the St. Paul, Minneapolis and Manitoba Railway Company was held for cancellation (the reason for such holding not appearing from your decision) with a view to the allowance of the timber culture application of Edwin C. Schow, presented in 1885; further, that said decision was declared final November 12, 1895, the listing on account of the Manitoba grant canceled, and Schow was permitted to make timber culture entry covering this tract on November 29, 1895.

The record now before the Department presents no claim to this land on account of the Manitoba grant.

Your office decision held that as Schow's application was presented long prior to the tender of the application to select on account of the Northern Pacific grant, the timber culture entry was properly allowed, and for that reason the rejection of the local officers of the proffered selection by the Northern Pacific Railroad Company was sustained.

It now appears that on April 1, 1898, Schow relinquished all right, title, claim and interest in and to the said tract under his timber culture entry, which thereby removes said entry from further considera-

tion in this case. While of record, however, said entry was a bar to the company's selection, but having been removed by Schow's relinquishment, unless other and sufficient reason appears, the company might now be permitted to select the land.

To this extent your office decision is modified.

MINING CLAIM—KNOWN LODE WITHIN PLACER.

CAPE MAY MINING AND LEASING CO. *v.* WALLACE.

A placer entry based on an application that does not disclose the existence of any known lode within the limits of the placer, or assert a possessory right to any such lode, and allowed without adverse action on the part of lode claimants, should pass to patent so far as the rights of such claimants are concerned; but the patent so issued will not prevent subsequent departmental inquiry, on behalf of lode claimants and after due notice, to determine whether a known lode existed within said placer at date of application, or the issuance of patent therefor if so found to exist.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 13, 1898.* (A. B. P.)

August 19, 1895, application was made at the Pueblo, Colorado, local land office, by James L. Wallace, for patent to the Free Coinage and Nellie B. placer mining claims, embracing the E. ½ of the NE. ¼ of the SW. ¼, the NW. ¼ of the NE. ¼ of the SW. ¼, and the N. ½ of SW. ¼ of the NE. ¼ of the SW. ¼, of Sec. 11, T. 15 S., R. 70 W. The application did not disclose the existence of any known vein or lode within the boundaries of the placer claims, nor did it assert any possessory or other right on the part of the placer claimant to any such vein or lode. Notice of the application was duly given, but no adverse claim was filed during the period of publication which ended in October, 1895, and on June 25, 1896, Wallace made mineral entry of the placer claims.

January 7, 1896, at the same local land office, Arthur J. Connell made application for patent to the Hosea P. lode claim; March 9, 1896, Henry Watson and John W. Davis made application for patent to the Mammoth lode claim, and October 4, 1896, the Cape May Mining and Leasing Company made application for patent to the Cape May lode claim. Each of these lode claims conflicts to some extent with the said placer claims and the conflicting areas are included in the application for patent to the placer claims and in the respective applications for patent to the several lode claims.

It is claimed that the placer claims were located as follows: the Free Coinage, August 7, 1893, and the Nellie B., July 1, 1895; and it is alleged that the lode claims were located as follows: the Mammoth, December 21, 1891, the Hosea P., March 11, 1892, and the Cape May, May 30, 1893. If the claimed dates of location are correct, all of the lode claims were located not only prior to the filing of the application

for patent to the placer claims, but also prior to the location of the placer claims.

No objection to the placer entry or to the patenting of the placer claims was made by any of the lode claimants, but the conflicts were brought to the attention of your office, first, by a plat or diagram submitted by the United States surveyor-general, as a part of the record of the placer entry; and, second, by the applications for patent to the said lode claims which in the meantime had been forwarded by the local land office. Your office then, upon its own motion, called upon the lode claimants to show cause why their several applications should not be canceled to the extent of the parts in conflict with the placer entry. The Mammoth lode claimant made no response; the Hosea P. lode claimant submitted a showing to the effect that the Hosea P. lode claim was discovered and located prior to the discovery and location of the placer claims, and at the time of the application for patent to the placer claims, contained a well-defined and well-known vein or lode of mineral bearing rock; and the Cape May lode claimant, by way of a purported appeal from the action of your office, submitted a showing to the effect that the Cape May lode claim was discovered and located prior to the discovery and location of the placer claims, and at the time of the application for patent to the placer claims, contained a known vein or lode of mineral bearing rock in place, and asked that a hearing be granted to enable the Cape May lode claimant to show why the portion of its claim in conflict with the placer entry should be allowed to, and patented in its name.

The manner of asserting and securing an adjudication of adverse claims to mineral land covered by a pending application for patent, is prescribed by sections 2325 and 2326 of the Revised Statutes, which contain the following provisions, among others:

SEC. 2325. . . . If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.

While these two sections originally applied only to lode claims, they are made applicable to placer claims by section 2329, except as otherwise provided in section 2333.

As before stated, notice of the application for patent to the placer claims was duly given, and no adverse claim was filed or prosecuted by either of the lode claimants. Applying sections 2325 and 2326 to these facts, it must be assumed that the placer applicant is entitled to patent upon payment for the land, and that no adverse claim exists; and no objection from third parties to the issuance of a patent to the placer claimant can now be heard, excepting it be shown that the applicant has failed to comply with the terms of the statute regulating the location and patenting of mining claims. Adverse claims must be asserted within the time prescribed and must be prosecuted to final adjudication in a court of competent jurisdiction, otherwise they are deemed to have been waived and are lost, unless it be shown that the applicant for patent has not complied with those requirements of the mining law which are conditions to obtaining patent, even where no adverse claim is asserted.

This result, so clearly following from the provisions of these two sections, is subject only to the exception or reservation prescribed by section 2333, which reads:

> Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim had no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

The application for placer patent in this instance, not mentioning the existence of any known vein or lode within the boundaries of the placer claims, and failing to assert any possessory or other right on the part of the placer claimant to any such known vein or lode, it must be held that if there be a vein or lode whose existence within the boundaries of the placer claims was known at the time of the application for the placer patent, the applicant has conclusively declared that he has no right of possession to such vein or lode. The rights of the lode claimants are therefore dependent upon the known existence of the veins or lodes in question within the boundaries of the placer claims at the time of the application for placer patent. In showing cause against the cancellation of their applications for patent to that portion of their claims in conflict with the placer claims, two of the lode claimants assert, as before stated, that the veins or lodes claimed by them within the bound-

aries of the placer claims were well known and well defined at the time of the application for the placer patent and had been duly located before the location of the placer claims. If they had regularly adversed the placer application and in the prosecution of their adverse claims had established these facts, judgments in their favor for the conflicting areas would have been rendered, upon which patents could have been issued to them, and by reason of which those areas would have been specifically excepted and excluded from any patent issued upon the placer claims. Instead of pursuing this course, the lode claimants apparently chose to rely upon the general reservation and exception contained in section 2333. The effect of that section as applied to cases like this, is clearly set forth in the recent case of Elda Mining and Milling Co. *v.* Mayflower Gold Mining Co. (26 L. D., 573). There the Mayflower company had made application for patent to two placer claims and no adverse claim being presented the application was passed to entry. Subsequently, the Elda company protested against the issuance of patent to the placer claimant, alleging that it was the owner of certain lode claims conflicting with the placer claims and containing veins or lodes whose existence was known at the date of the application for the placer patent. As in the case at bar, the placer application did not mention the existence of any known veins or lodes, or assert any possessory or other right thereto on the part of the placer claimant. Upon this state of facts, and referring to section 2333, it was said:

> Lodes or veins known to exist within a placer claim at the date of the application for the placer patent, and which are not applied for at that time by the placer applicant, are by operation of law excepted from the placer patent, and a clause fully recognizing this exception is inserted in all placer patents without previous inquiry by the land department into the existence of any such lode or vein.
>
> Whether this exception extends to the entire surface area of the protestant's said lode claims (see Pike's Peak Lode, 10 L. D., 200, 203), or whether by reason of protestant's failure to adverse the application for the placer patent the exception embraces only the known lodes or veins and twenty-five feet on each side thereof (see Shonbar Lode, 1 L. D., 551; Id., 3 L. D., 388; Becker *v.* Sears, on review, 1 L. D., 577), or only the known lodes or veins and so much of the adjoining surface area as is necessary to the occupation, use, operation and enjoyment of the lode claims by their owner (see Aurora Lode *v.* Bulger Hill and Nugget Gulch Placer, 23 L. D., 95–105), need not now be considered or determined because, if in fact such lodes or veins were known to exist at the time of the application for placer patent, the exception, whatever its extent, is embraced and included in the reservation which forms an essential part of the terms of a placer patent, both by operation of the statute making the exception and by the recognition of the exception in the express language of the patent.
>
> The rights of the protestant as a lode claimant, whatever they may be, will not be affected by the issuance of á patent upon the placer entry as allowed, but will be preserved and protected as fully as if now determined and specifically excepted from the operation of that patent, and the subsequent issuance of lode patents to the protestant covering its rights to the known lodes or veins, if there were such at the date of the placer application, will not be prevented or hindered by the placer patent.

Following that decision the placer applicant will be permitted to carry its entry to patent, if its showing of compliance with the mining

law is satisfactory. If the lode claimants or any of them desire to further prosecute their applications for patent to the areas in conflict it will be necessary for them to establish at a hearing, of which the placer claimant must have due notice, that such areas contain veins or lodes whose existence was known at the date of the application for the placer patent. The lode claimants do not charge that the placer claimant has not complied with the terms of the mining law. By their course they have elected to rely upon the general reservation or exceptiom made in section 2333 and they should not be permitted to delay or obstruct the issuance of a patent to the placer claimant.

The action of your office is accordingly vacated, with instructions to take further proceedings in conformity herewith.

MINERAL LANDS—BUILDING STONE—LOCATION.

FORSYTHE ET AL. *v.* WEINGART.

Land chiefly valuable for the building stone found therein is subject to location and occupation under the mining laws; and a placer location of such a tract precludes the sale thereof to a subsequent applicant under the act of June 3, 1878.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 15, 1898.* (C. J. W.)

Henry Weingart, on February 19, 1896, made application at the Lewistown land office, Montana, under the act of June 3, 1878 (20 Stat., 89), as extended by the act of August 4, 1892 (27 Stat., 348), to purchase the SE. ¼ of the NW. ¼ of Sec. 23, T. 15 N., R. 18 E. Notice of intention to offer proof was duly published, and on May 4, 1896, proof was offered. On the same day William A. Forsythe and John Laux appeared and protested against the proof, alleging in the protests filed that they had, on the 8th of April, 1893, located the land in question under the placer mining laws, and filed notice of such location and a declaratory statement in the office of the county clerk and recorder for Fergus county, Montana, in which county the land lies; that at the time Weingart made his application he had notice of the claim of protestants, and that they had opened up a valuable quarry of stone upon said land. Permission was asked to cross-examine Weingart and his witnesses, and to offer proof of their allegations; this privilege was allowed them. After the hearing, on December 12, 1896, the local officers passed upon the respective claims of the parties and recommended the acceptance of the final proof of Weingart and the dismissal of the protests of Laux and Forsythe.

The protestants appealed, and on April 22, 1897, your office reversed the local office, and held, substantially, that the land was excluded from purchase under the act aforesaid by reason of improvements upon it. In other respects your office seems to have agreed with the local officers in the conclusion reached by them.

Weingart has appealed from your office decision, and an examination of the record has been made.

The land in question does not appear to be improved land within the meaning of the act of June 3, 1878, but is of the character of lands which may be disposed of, either under that act, or under the placer mining laws. Weingart having applied to purchase it under the timber and stone act, and Forsythe and Laux having alleged its location as a placer mining claim, a question of priority of right is presented which involves the necessity of determining whether in fact protestants have a placer mining location which embraces the land in dispute.

Since your office decision was rendered, the Department, by its decision in the case of Pacific Coast Marble Co. *et al.* *v.* Northern Pacific R. R. Co. *et al.* (25 L. D., 233), held, in substance and effect, that lands chiefly valuable for deposits of building stone are embraced in the term "lands valuable for minerals," as used in the mining laws, and overruled all former departmental decisions in conflict with the views therein expressed. Under the ruling in said case it is no longer to be held, as was done by your office in the case under consideration, that no right attaches to land chiefly valuable for building stone by virtue of its location as a placer claim, and for the reason that such stone is a mineral, and the land, the chief value of which consists of the building stone it contains, is free to exploration and purchase, or to location and occupation under the mining laws.

It appears from the evidence that in 1893 protestants made informal application to purchase the land under the timber and stone act, which was for a time held under advisement by the local officers, who, subsequently, returned to protestants the money deposited to cover fees, and advised them that the land was subject to disposal under the placer mining laws. They proceeded to locate the land in dispute, describing it as the SE. ¼ of the NW. ¼ of Sec. 23, Tp. 15 N., R. 18 E., and referred to it in the body of the notice as a "building claim, mining claim," and "the claim for building rock," setting forth that the location is distinctively marked on the ground by substantial posts or monuments of stone at each corner of the claim and where said notice is posted. The same was recorded in the office of the recorder, in the county where the land lies.

It is apparent that said location was made under the placer mining laws, though a printed form intended for a lode location was used. The claim, however, is so described as to put the public on notice of what the claim is, and Weingart appears to have had both actual and constructive notice of it before he made his application to purchase. The right of the locators is clearly prior to his, and your office properly rejected his application.

Your office decision is modified to conform to the views herein expressed.

TIMBER CUTTING—REPORTS OF SPECIAL AGENTS.

ORDER.

Commissioner Hermann to Special Agents of the General Land Office, December 14, 1898.

Complaint having been made by the Honorable Attorney General to this Department, that, in a large number of cases of alleged unlawful cutting and removing of timber from public lands, in which legal proceedings have been recommended by this office, based on reports of special agents, the facts and evidence submitted in the special agents' reports have been found, upon trial, or upon close examination by officers of the judiciary, to be inadequate to sustain the action recommended, you are advised that, hereafter, no criminal prosecution, civil suit, or any other legal proceedings whatever, will be recommended by this office upon a special agent's report, unless said report is properly submitted on the form provided for that purpose, and *all* of the information called for therein and required by the general instructions to special agents issued March 8, 1898, pages 32 to 42 inclusive, is furnished in clear and explicit terms, and the facts and evidence specified therein are so full and complete, as to fully maintain the charges of the special agent as to violation of law.

In accordance therewith, you are hereby specially and imperatively directed, not to submit any report to this office, charging the unlawful cutting and removing of timber from public lands, except in form and manner above described, in which the information furnished has been acquired by personal examination of the lands and personal investigation as to all facts and circumstances connected with the alleged violation of law.

You must, in every case, irrespective of the amount involved, prepare your reports on cases of alleged timber trespass, with the same care, thoroughness, and attention to specific facts and details, as you would exercise in preparing the case for direct submission to a court of justice for immediate trial, the result of which depended upon your own exertions and testimony.

A failure to comply strictly and fully with these instructions, will be charged against your efficiency record, and you will be held directly responsible for any failure to sustain the charges or allegations in cases of alleged timber trespass in which legal proceedings are recommended by this office based upon your reports.

Approved,

THOS. RYAN,

Acting Secretary.

PRIVATE LAND CLAIM—CONFIRMATION—PATENT.

LAS VEGAS GRANT.

The petition for the Las Vegas grant set forth specified boundaries, the grant was made conformably thereto, and the surveyor general recommended the confirmation of the grant as a whole, and, as the act of June 21, 1860, confirming said grant fixed no limitations as to the acreage thereof, it must be held that the grant was confirmed in its entirety, for the full amount of land embraced in the boundaries, and that patent should issue accordingly.

The declaration of Congress as to the confirmee of a private land claim must be accepted by the Department as designating the proper party to whom patent for such claim should issue.

The departmental decisions of December 5, 1891, 13 L. D., 646, and July 16, 1892, 15 L. D., 58, revoked, and the case remanded for action in accordance with the judgment herein.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 17, 1898.* (W. C. P.)

Under date of December 5, 1891, Secretary Noble addressed a letter to your office wherein he gave a history of the Mexican grant commonly known as Las Vegas, and directed a resurvey thereof to include only such lands within the outboundaries of the grant as had been taken up and occupied by settlers at the time the Territory of New Mexico came under the control of the United States government and its laws, and that patent issue to the town of Las Vegas on such survey (13 L. D., 646). A motion for review of that decision, filed in behalf of Moses Milhiser *et al.*, claimants under the grant, was denied July 16, 1892 (15 L. D., 58). A further motion, filed by the county commissioners of San Miguel County, New Mexico, and asking for reversal of the decision of December 5, 1891, or so much thereof as related to the extent of the grant, was denied May 16, 1894.

Before a survey was made under that decision Jefferson Raynolds, for himself and the other inhabitants of the town of Las Vegas, in New Mexico, and of the Las Vegas grant and the town of Las Vegas, filed a bill in equity in the supreme court of the District of Columbia, making Hoke Smith, Secretary of the Interior, and Silas W. Lamoreux, Commissioner of the General Land Office, parties defendant, and asking that said defendants be perpetually enjoined from carrying out the decision of Secretary Noble or in any manner interfering with the rights, titles and privileges of the plaintiffs, and that the plaintiffs' title be quieted. The defendants filed a demurrer to this bill, which was overruled, and a decree entered enjoining the defendants from carrying out the decision of Secretary Noble or interfering with said lands or the right and title of the plaintiffs, and decreeing "that all cloud upon said title be removed and the same be quieted and held to be good and indefeasible title in and to the town of Las Vegas."

The defendants appealed to the court of appeals of the District of Columbia, where the decree below was affirmed. A further appeal

was taken to the supreme court of the United States, but the defendants having retired from office, that court, on March 15, 1897, entered an order reported in 166 U. S., 717, as follows:

Decree reversed on authority of Warner Valley Stock Co. *v.* Smith, 165 U. S., 28, each party to pay their own costs in this court, and cause remanded to the court of appeals with directions to reverse the decree of the supreme court of the District of Columbia and remand the cause to that court with directions to dismiss the bill with costs, for want of proper parties.

The town of Las Vegas now asks that a patent be issued to the town for the land included in said grant as surveyed in 1860. Marcos Maese *et al.*, claiming to be the original grantees or their representatives, have also filed a petition asking that patent be issued in the names of the original grantees. These parties each filed similar papers in your office, which have been transmitted for consideration here. Elaborate arguments, both oral and printed, have been submitted.

No patent having issued, the matter is still within the jurisdiction of this Department to determine what land such patent should cover and to whom it should issue. (Aspen Consolidated Mining Co. *v.* Williams, 27 L. D., 1.)

The history of this grant has been fully set forth in the former decision and need not be repeated here in detail. A grant was made by the Mexican authorities to Juan de Dios Maese and others and the parties were formally put in possession thereof April 6, 1835. The act of July 22, 1854 (10 Stat., 308), established the office of surveyor-general for the Territory of New Mexico, and by section eight prescribed that he should "ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico," and make full report on all claims, denoting the various grades of title, "with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States."

Francisco Lopez, Henry Connelly and Helario Gonzales, "on behalf of themselves and a large number of citizens of the United States, residents of the town of Las Vegas and its vicinity," presented their petition to the surveyor-general, setting forth that they were claimants and legal owners of a certain tract of land in the county of San Miguel granted to "Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio Casados, in their own behalf and that of twenty-five other inhabitants of said county," and asking that their claim and title to said lands be examined and that said grant be confirmed to them. This grant was in conflict with a prior one to Luis Maria Baca, and the surveyor-general did not attempt to determine the rights of the respective claimants, holding that to be no part of his duties. He states that the original petition was for a grant bounded as follows: "On the north by the Sapello river, on the south by boundary of the grant of Don Antonio Ortiz, on the east by the Aguage de la Llegua, and on the west by the boundary of the town of El Bado;"

that the corporation of El Bado recommended that the petition be granted; that the territorial deputation made the grant, "with the boundaries asked for, with the further provision that persons who owned no lands were to be allowed the same privilege of settling upon the grant as those who petitioned for it;" and that the parties were placed in possession. In regard to the validity of the grant he said:

> The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but as far as the documentary evidence shows, is made in strict conformity with the laws and usages of the country at the time.

The surveyor-general thus decided in favor of the validity of this grant, with the boundaries set forth in the original petition, as against all the world except the claimants under the Baca grant. His opinion as to the grant is more fully set forth in the last paragraph of said report, which reads as follows:

> It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

A schedule of nineteen private land claims in New Mexico, numbered 20 to 38, both inclusive, was submitted to Congress February 3, 1860. The names of the claimants of No. 20 are given as "Town of Las Vegas and Thos. Bacca *et als.*"

In the senate this matter was referred to Committee on Private Land Claims, whose report, after stating that the report of the surveyor-general on each claim had been examined by them, says "they concur fully in the reports of that officer, recommending the confirmation of all said claims except that which is numbered twenty-six, in the name of Juan B. Vigil." The committee evidently understood that the claim here under consideration was recommended for confirmation as a whole and to the extent of the boundaries mentioned, and the further action of Congress in the premises was upon this hypothesis.

As to this particular claim, the committee said:

> Amongst the claims embraced, however, in this second report, and recommended for confirmation, are two which cover the same tract of land, and are embraced in one number, to wit, No. 20.
>
> To this tract the two claimants are: First—The heirs of Luis Maria Baca . . . Second—The town of Las Begas or Las Vegas. This town claims under a grant made on the 25th March, 1835, to Juan de Dios Maere and twenty-seven others by the territorial deputation, on a petition which represented the land to be *public land* and the petitioners were put in possession. The land has been divided out, and several hundred families are located on it.

This committee further stated that the claimants under the Baca grant had expressed a willingness to waive their older title in favor of the settlers if allowed an equivalent quantity of land elsewhere in the Territory, and to carry out this proposition, presented a substitute for

the bill referred to them. The grant was confirmed by the act of June 21, 1860 (12 Stat., 71), as follows:

> That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstract marked exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be and the same are hereby confirmed, with the exception of the claim numbered twenty-six, etc.

By section six the claim of the Baca heirs was provided for as follows:

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico.

The Commissioner of the General Land Office at once directed the surveyor-general of New Mexico to have the exterior lines of the Las Vegas town claim properly run and connected with the public surveys, saying:

> The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to locate a quantity equal to the area of the town tract elsewhere in New Mexico as vacant land, not mineral, in square bodies not exceeding five in number.

A survey was made showing the grant to contain 496,446.96 acres, the plat of which was approved by the surveyor-general December 8, 1860.

The survey thus made remained unquestioned until 1887, when the then surveyor-general expressed the opinion that the grant as surveyed included more land than should have been included, and recommended that a resurvey should be made. This view was adopted by your office and a resurvey was ordered and begun, but not completed for lack of funds. In 1890 the surveyor-general expressed his disapproval of the recommendation of his predecessor for a resurvey and recommended that patent issue to the town of Las Vegas on the original survey. The matter remained in this condition until the departmental action of December 5, 1891, *supra*.

In the meantime the Baca claimants had made selection and have obtained the full number of acres reported by the original survey, as included in the grant. In the former decision it was said that there was doubt as to the extent of the grant and confirmation, but the facts do not seem to justify that statement. The petition was for a grant with specified boundaries, the grant was made conformably to the petition, the parties were put in possession of the grant as made, the surveyor-general recommended the confirmation of the grant as a whole as against all but the Baca heirs, the senate committee approved the recommendation of the surveyor-general, speaking of the land granted as "this tract," Congress confirmed the grant as recommended and provided for the satisfaction of the adverse claim of the Baca heirs by allowing the

claimants to select an equal quantity of land elsewhere, a survey was made to ascertain the quantity of land in the grant as finally confirmed, and from that time (1861) until 1887 the grant was treated as confirmed for the full quantity of land within the boundaries mentioned in the original petition. Until 1887 there was no suggestion in any of the proceedings that the grant should be limited to less land than the quantity embraced in the boundary mentioned in the original petition. The conclusion irresistibly follows from these facts that the grant was confirmed by Congress as an entirety for the full amount of land embraced within the boundaries set forth, and patent should issue therefor.

The action of Congress is conclusive. The supreme court, in Tameling *v.* U. S. Freehold, etc. Co. (93 U. S., 644), speaking of private land claims, uses the following language:

> No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor-general, in the exercise of the authority with he was invested, decides them in the first instance. The final action on each claim reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum.

In the Maxwell Land-Grant case (121 U. S., 325–365) the court quotes from the Tameling case and re-affirms the doctrine there laid down. The grant involved in the Maxwell case was confirmed by the same act as was this Las Vegas grant and it was there contended that the quantity of land covered by the patent was far in excess of the quantity authorized by the Mexican laws for such grants. The court, however, says that this was a question which the surveyor-general was authorized to report upon and for Congress to finally determine. It is also pointed out that some of the grants confirmed by this same act were limited as to extent and location, and it is therefore concluded that as to those not so limited "it was intended to be a full and complete confirmation as regards the legal validity, fairness, and honesty of the grant as well as its extent." The same argument is equally applicable here.

The question as to whom the patent should issue was considered when the matter was before this Department in 1891, and it was then held that it should issue to the town of Las Vegas, inasmuch as the confirmation was made direct to the town. On review it was strongly urged that it was error to hold that patent should issue to the town, but that position was adhered to by the Department (15 L. D., 58). The grant as petitioned for was to be to individuals, but as finally made by the territorial deputation provision was made whereby others having no lands should be allowed the same privilege of settling upon the land as those who had petitioned for the grant. This, like most Spanish and Mexican grants, was made with a view to the establishment of a community for protection against the Indians. It is asserted that the Spanish word "plaza" as used in the papers relating to this grant was erroneously translated "town," as it simply meant a square place. However that may be, it is certain that the building up of a town was to be expected and actually followed the settlement upon the lands

granted. The community was added to until at the time of the cession to the United States more than two hundred individuals had been recognized as entitled to share in the benefits of the grant and had been put in possession of tracts of land within the boundaries petitioned for. A town had grown up before the cession to the United States. The petition to the surveyor-general asking for an examination and confirmation of the grant was made by Francisco Lopez, Henry Connelly and Hilario Gonzales, "on behalf of themselves and a large number of citizens of the United States residents of the town of Las Vegas and its vicinity." The exact interests of the petitioners, or the manner in which they became the owners, is not set forth. In the report of the surveyor-general who was by the act of July 22, 1854, *supra*, made a special tribunal to ascertain the origin, nature, character, and extent of such claims and decide as to their validity or invalidity, this grant is spoken of as the "claim of Las Vegas" and in the schedule of cases submitted by him there is a column headed "Names of Claimants" and under this head the claimants of No. 20 are designated as "Town of Las Vegas and Thos. Baca et als." This shows that the surveyor-general regarded the claimant for this grant to be the town.

The senate committee, in the report heretofore referred to, designate one of the claimants to this grant as "the town of Las Begas or Las Vegas" and say, "This town claims under a grant made on the 25th of March, 1835, to Juan de Dios Maese and twenty-seven others." The act of confirmation, July 21, 1860 (12 Stat., 71), confirmed the claim, with others, as recommended by the surveyor-general. This would be sufficient to justify the conclusion that the confirmation was to the town, but this conclusion is further supported by the fact that in providing for the heirs of Baca, Congress specifically said that the land to be selected by them should be in place of the land "claimed by the town of Las Begas." It seems clear from all this that the confirmation was intended to be to the town.

The declaration of Congress as to the confirmee is accepted by this Department. If Congress had made a grant to the town of Las Vegas there would have been no room for discussion as to whom the patent should issue. The supreme court has said that an act of confirmation passes the title of the United States as effectually as if it contained in terms a grant *de novo*. Ryan *et al. v.* Carter *et al.* (92 U. S., 78). The title to this land passed by the confirmatory act, and the recipient thereof was the confirmee indicated by the act. This was the town of Las Vegas, and to that confirmee must the patent issue.

That the people composing the town were understood to be the confirmees is shown by various annual reports of your predecessors, where, in giving a list of private land claims, under the heading "confirmee" or "present claimant," the phrase "inhabitants of town" is used. The question as to the proper patentee has been twice considered by this

Department, and both times it was held to be the town (13 L. D., 646; 15 L. D., 58). By the decree rendered by the supreme court of the District of Columbia in the suit heretofore mentioned it was adjudged that the lands contained in said grant "were absolutely and unconditionally confirmed to the said town of Las Vegas, and that said town became and is the absolute owner thereof in fee." Upon appeal this decree was affirmed by the court of appeals.

It is thus seen that the uniform holding has been that the town of Las Vegas is the confirmee and owner of the lands embraced in this grant.

For the reasons herein set forth it must be held that said grant was confirmed to the town of Las Vegas for the full quantity of land embraced within the boundaries set forth in the original petition. The decisions of this Department holding to the contrary are to that extent hereby revoked and set aside and the case is returned to your office for such action as may be necessary to the issuance of patent in accordance with the views herein set forth.

MARSHALL *v.* THE DALLES MILITARY WAGON ROAD CO.

Motion for review of departmental decision of September 30, 1898, 27 L. D., 478, denied by Acting Secretary Ryan, December 17, 1898.

REJECTED APPLICATION—FAILURE TO APPEAL.

OLSEN *v.* SIMONSON.

Failure to appeal from the erroneous rejection of an application to enter defeats the right of the applicant, where the adverse application of another party intervenes. The case of Ard *v.* Brandon, 156 U. S., 537, cited and distinguished.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 17, 1898.* (L. L. B.)

Hans K. Olsen has appealed from your office decision of May 12, 1897, dismissing his contest against the homestead entry of Sivert Simonson for the E½ of the SE¼ of Sec. 28, T. 122 N., R. 44 W., Marshall, Minnesota.

The record as presented in the decision appealed from shows that the land in controversy has been embraced in the claims of various parties, including the Hastings and Dakota Railway Company, whose claims have heretofore been eliminated leaving now only the claims of the litigants herein to be determined. For a proper determination of the claims of the said litigants, the following facts of record only need to be considered.

November 9, 1891, Olsen applied to make homestead entry. His appli-

cation was rejected because of the selection of the Hastings and Dakota Railroad Company, which was then of record. Olsen did not appeal. (This application of Olsen is not noted in your office decision as it did not at the date thereof appear in the record, but has since been certified to by the register, his certificate bearing date June 16, 1897). February 22, 1892, Sivert Simonson applied to make homestead entry for the land in dispute which was rejected for conflict with the railroad selection and the declaratory statement of one Grimsborg, from which rejection Simonson duly appealed. Your office decision makes this application of Simonson cover the whole quarter section; this is a mistake; the application is here and shows that he applied for the east half only, which is the land in dispute.

March 9, 1892, Olsen again applied to make entry for the said east ½ of this quarter section. (In your office decision it is said that this second application of Olsen covered the whole quarter section, but reference to the application which is in the record shows that it embraced only the east half.) This application was also rejected and Olsen appealed.

During all the foregoing proceedings it appears that the records of the local office showed that the tract was covered by the railroad selection, whereas in fact the selection of the company had been canceled April 8, 1890; but for some reason this cancellation had not been noted on the records of the local office.

All other claims to the land in controversy having been eliminated, your office, by letter of November 9, 1895, in view of the prior application of Simonson, directed that Olsen be given sixty days in which to show cause why his application should not be rejected. Notice of this action of your office was served upon Olsen's attorney of record, but Olsen claims that he was not informed of that fact, and he made no showing in response to this direction, and February 20, 1896, his applition was rejected and his case closed.

By letter of March 14, 1896, your office directed the local officers to notify Simonson that he would be allowed thirty days in which to make entry of the land, and March 31, 1896, he did so under new entry papers of that date.

This was the status of the land when, on April 18, 1896, Olsen filed his affidavit of contest against the said entry of Simonson, alleging that Hayden French, to whom notice to show cause, etc., was sent, was not at the time he was served with notice, the attorney for Olsen, and that he, French, never notified him of such action by your office until it was too late for him to show cause why his application should not be rejected, etc., and too late to take an appeal from such rejection. His contest affidavit also alleges that he had been a resident on the land continuously since March 1890; that his improvements are of the value of at least $400., and that Simonson knew when he offered to enter that Olsen was residing on said land.

Hearing was had June 23, 1896. The register and receiver recom-

mended the cancellation of Simonson's entry, and that the application of Olsen be reinstated.

By the decision appealed from the action of the local office was disapproved upon the ground that Olsen did not make application to enter within such time as would entitle him to hold the land by virtue of his prior settlement and his contest was dismissed.

From the foregoing record it is apparent that at the date of Olsen's first application to enter, November 9, 1891, the land was subject thereto and if he had appealed from the rejection of his application there would now be no question as to his priority. He, however, acquiesced in this rejection and prior to his second application (March 9, 1892), Simonson had applied to enter, his application having been presented February 22, 1892. Simonson preserved his rights under his said application by appealing from its rejection. But it is insisted by counsel for Olsen that under the decision of the Supreme Court in the case of Ard *v.* Brandon and Ard *v.* Pratt, 156 U. S., 537, Olsen lost nothing by his failure to appeal from the rejection of his application of November 9, 1891.

Olsen's evidence shows that although he commenced cultivating this land in 1890 he did not reside on it until late in the fall of 1892. In the interim he resided with his father. He was not a settler upon the land when Simonson applied to enter in February, 1892. See Hanson *v.* Roneson, 27 L. D., 382. In the Ard-Brandon case, *supra*, the homestead claimant was a settler upon the land at the time of the erroneous rejection of his application to make entry, and continued thereafter to assert his claim by settlement and residence.

That case is not an authority for the contention here made.

Olsen not appealing from the rejection of his first application and not being a settler on the land at the date of Simonson's application, it must be held that as against Simonson his first application was without effect, and his second application being subsequent to the application of Simonson, was subject thereto.

The decision appealed from, in so far as it holds the entry of Simonson intact, is affirmed.

CONTEST—ABANDONMENT—FOREST FIRES.

BESTUL *v.* LAUFENBURG.

A contest against a homestead entry for abandonment will not lie where the absence of the entryman from the land is due to forest fires, and is excused under the provisions of the act of January 19, 1895.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 17, 1898.* (G. C. R.)

On May 5, 1892, Frank Laufenburg made homestead entry for lots 1, 6, 12 and 13, and the SE. ¼ of the NE. ¼ of Sec. 3, T. 64 N., R. 4 W., Duluth land district, Minnesota.

On February 4, 1896, Andrew T. Bestul filed his affidavit of contest against the entry, alleging abandonment and change of residence "for more than six months since making said entry and next prior to the date herein," etc.

Service was secured by publication. The hearing was had April 6, 1896. Both plaintiff and defendant were present. Upon the hearing the register and receiver dismissed the contest, and your office, by decision dated April 26, 1897, affirmed that action. Contestant has appealed to this Department.

The contestant testified that at different times in the year 1895 no one was living on the land; that there was no house built thereon, and the same was unoccupied and not improved.

It was shown, however, that about a month after the entry, Laufenburg built a house on the land, fourteen by fourteen feet, and moved into it, taking with him such household goods as were necessary, etc.; that he cleared a small tract of land and put in "a very little" crop; that in 1893 he cleared more land, and put in about half an acre in garden; in 1894 he planted about two acres of the land to garden vegetables, and lived there until June of that year, when a destructive forest fire burned up his house and all its contents, and that he had to leave the land for that reason. He testifies that he built another house in the spring of 1895, and partly completed it, but did not re-establish his residence on the land because he had to work for a living, etc.

The act approved January 19, 1895 (28 Stat., 634), provides as follows:

> That all such persons actually occupying homesteads in said States of Wisconsin, Minnesota, and Michigan at the time of such fires, upon claims under the laws of the United States, on lands of the United States, whose property and buildings were destroyed by such fires, and the heirs of all such persons who perished by such fires, and all persons who by reason of such fires and loss of property were obliged to leave their homesteads, are hereby granted two years' additional time in which to make final proof. And temporary absence for any period within two years from the date of this act shall be deemed constructive possession and residence, but shall not be deducted from the time required to make final proof.

The evidence in the case clearly brings the entryman within the provisions of this statute.

The contest was filed February 6, 1896, alleging abandonment for six months next preceding that date. The statute quoted excuses absences from lands brought within its provisions for two years after the passage of the act; such absences, for the reasons given, are "deemed constructive possession and residence," and hence the allegation in the contest affidavit, if fully proven, would not be sufficient upon which to cancel the entry.

Since the hearing, and on December 14, 1897, the entryman submitted final proof, which the register and receiver have rejected because of insufficient residence; the same is herewith returned to your office for appropriate action.

The decision appealed from is affirmed.

ABANDONED MILITARY RESERVATION—PRIVATE SALE.

INSTRUCTIONS.

Lands within an abandoned military reservation that have been appraised the second time, and offered without a resulting sale, are not subject to private sale, until after a second offering.

Secretary Bliss to the Commissioner of the General Land Office, December 20, 1898. (A. M.)

The lands in the abandoned military reservation on Bois Blanc Island, Michigan, were appraised in 1887, under the second section of the act of July 5, 1884 (23 Stat., 103), and, the appraisal having been approved, the lands were by direction of the Department offered at public sale, after the required publication, and a portion of the lands were sold.

In 1891 the unsold lands were by direction of the Department reoffered, but were not sold because of lack of bidders.

Your office, on the supposition that the appraisal was excessive, caused the lands to be re-appraised in 1895, and the re-appraisal was subsequently approved.

Under the re-appraisement the lands were offered at public sale and the result of the offering was reported to the Department in letter of November 20, 1896, from your office. In that letter it was recommended that as the current appropriation for expenses incident to the disposal of such lands was about exhausted, the re-offering of the lands be postponed till another appropriation became available. Accordingly by departmental letter of December 3, 1896, it was directed that no further action respecting the unsold lands be taken at present.

I now have before me your letter of the 7th instant wherein you review the action heretofore taken with respect to this reservation and state that as the offerings have not met with much success, you are of opinion that the lands may be advantageously disposed of at private sale.

You have accordingly recommended that you be authorized to direct the local officers to dispose of the unsold lands at private sale, for cash, at not less than their appraised value.

The unsold lands in this reservation being devoid of improvements, buildings etc., are subject to disposal only in accordance with the terms of section two of the above act and the only procedure authorized thereby is as follows:

On the approval of the appraisement it is required of the Secretary of the Interior that he shall cause the lands to be sold at public sale to the highest bidder for cash, at not less than the appraised value thereof, nor less than $1.25 per acre, after sixty days public notice. If any lands remain unsold after such offering they may be re-offered for sale at any subsequent time, in the same manner, at the discretion of the Secretary.

After these steps looking to the disposal of the lands have been taken the statute provides further, respecting any lands that may still remain unsold, that, "if not sold at such second offering for want of bidders, then the Secretary of the Interior may sell the same at private sale," etc.

By reason of the offering and re-offering under the original appraisement it would have been competent for the Secretary to have thereafter directed that the residue of the lands be disposed of at private sale, at not less than their appraised value, nor less than $1.25 per acre. The matter was not however again brought to the attention of the Department till the re-appraisement referred to was submitted for departmental action.

This re-appraisement placed a new and different valuation on the tracts examined by the appraisers and its acceptance formed a basis for new offerings.

Under the law it is imperative that the lands be offered after each and every re-valuation that may be placed thereon, re-offerings *may* follow such offerings, and, if it is contemplated to dispose of the lands for cash at private sale, they *must* follow, because the statute says of the lands that "if not sold at such second offering" and in no other event, "the Secretary of the Interior may sell the same at private sale."

It is stated in your letter that the lands have been thrice offered for sale. Two of these offerings were, however, under the original appraisement and their influence as conditions precedent to private sale ceased when a second appraisement was recognized. So that there yet remains another public offering before private sale can be made under the new valuation.

In view of the foregoing construction of the statute I cannot now authorize the disposition of the lands at private sale.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT CLAIM.

HASTINGS AND DAKOTA RY. CO. *v.* MOE.

A claim of residence will not be accepted as sufficient to defeat a railroad indemnity selection, if it does not affirmatively appear that the occupant was duly qualified to assert a claim under the settlement laws at the date of said selection.

Secretary Bliss to the Commissioner of the General Land Office, December 20, 1898.

(W. V. D.) (F. W. C.)

An appeal has been filed on behalf of the Hastings and Dakota Railway Company from your office decision of June 10, 1898, in the matter of the case of said company against Julius J. Moe, involving the SE. ¼ of the SW. ¼ and the W. ½ of the SW. ¼ of Sec. 13, T. 120 N., R. 41 W., Marshall land district, Minnesota, in which the showing filed on behalf of Moe, accompanying his homestead application filed on August 31, 1894, was held to be sufficient to evidence a claim to the land prior

to the company's selection of October 29, 1891, and the selection list of that date was accordingly held for cancellation as to the tract here involved with a view to allowing Moe's homested application.

This tract is within the indemnity limits common to the grants for the St. Paul, Minneapolis and Manitoba Railway Company (main line) and the Hastings and Dakota Railway Company. The respective claims of said companies within such indemnity limits were considered in departmental decision of October 23, 1891 (13 L. D., 440), in which the rejection of the attempted selection by the Hastings and Dakota Railway Company, on May 26, 1883, of certain lands within such conflicting limits, including the tract here in question, was affirmed, and in view of departmental order of May 22, 1891 (12 L. D., 541), revoking the indemnity withdrawal ordered on account of this grant, the land was held to be subject to selection by the company upon presentation of a proper list, or to settlement and entry by the first qualified party.

Following said decision of October 23, 1891, a selection list was filed on behalf of the Hastings and Dakota Railway Company on the 29th of that month, which list included the tract here in question.

On February 25, 1892, Moe tendered a homestead application for the entire SW. ¼ of said section 13, which application was rejected by the local officers, the reason assigned being that the SE. ¼ of the SW. ¼ and the W. ½ of the SW. ¼ of said section was included in the pending selection by the St. Paul, Minneapolis and Manitoba Railway Company, presented February 10, 1880; further, that the NE. ¼ of the SW. ¼ of said section had been selected by the State on account of the swamp land grant. From said rejection Moe appealed to your office.

In the affidavit accompanying said application he swears that he is a native-born citizen of the United States; subsequently, to wit, August 31, 1894, he filed a second application to enter the SW. ¼ of section 13, the same being accompanied by evidence tending to show that the NE. ¼ of the SW. ¼ of said section was not swampy in character within the meaning of the grant of 1860; further, that he had settled upon the tract in the month of June, 1889, and had lived thereon continuously, and had made improvements consisting of a house, barn, granary, and one hundred and twenty acres of breaking, all of the value of about $800. In the affidavit accompanying this application he swears that he is a foreign-born citizen of the United States, but does not show how he became a citizen of the United States nor when, if ever, he declared his intention to become a citizen of the United States.

In accordance with the circular of September 6, 1887 (6 L. D., 131), it appears that notice was given the company of Moe's application and that it duly filed a protest against the acceptance of the same, setting up a claim to the land under its attempted selection of May 26, 1883, before referred to, but in no wise traversing Moe's allegation of settlement and continuous residence preceding the selection of October 29, 1891. Your office decision therefore ruled that a hearing was unneces-

sary, and held the company's selection for cancellation with a view to allowing Moe's application, referring to departmental decision in the case of Vanderberg *v.* Hastings and Dakota Ry. Co. *et al.* (25 L. D., 390), as authority therefor.

During the pendency of Moe's application, to wit, on October 8, 1895, the said NE. ¼ of the SW. ¼ of said section 13 was patented to the State under the swamp land grant. Your office decision therefore held that this tract had passed from its jurisdiction and rejected Moe's application to that extent; from which action he has failed to appeal.

From that decision, however, an appeal has been filed on behalf of the company. Admitting that the company is bound by the showing filed in support of Moe's application, the same not having been traversed in its protest, yet this Department can not agree with the conclusion reached in your office decision that it evidences such a claim as barred the company's right to select the land on October 29, 1891. It is clear that the showing evidences that Moe was a resident upon the land for a long time prior to the company's selection, but it does not affirmatively appear that he was duly qualified to assert a claim under the settlement laws at the date of said selection. In an affidavit accompanying the homestead application, notice of which was given the company, he swears that he is a foreign-born citizen of the United States. From this it would appear that he was foreign-born but had in some way, either through his own declaration or the naturalization of his father, become a citizen of the United States. Just how or when such action was taken does not appear, so that it can not, therefore, be said that, from the showing, it affirmatively appears that Moe was a citizen of the United States on October 29, 1891.

The record is therefore herewith returned with direction that a hearing be ordered to determine whether Moe was a qualified settler at the date of the company's selection, and your office decision is accordingly modified.

OKLAHOMA LANDS—DISQUALIFIED SETTLER.

McMillan et al. *v.* Harris.

One who employs another to enter the territory prior to the hour of opening, with the view to securing an advantage over others, is thereby disqualified as an entryman, though it may not appear that he settled on the tract occupied by the person so employed.

Secretary Bliss to the Commissioner of the General Land Office, December 20, 1898.

(W. V. D.) (C. W. P.)

The case of Alexander W. McMillan and others against Stephen O. Harris, on appeal by McMillan and Harris from your office decision of August 14, 1897, involving the NE. ¼ of Sec. 17, T. 26 N., R. 1 E., Perry land district, Oklahoma Territory, has been considered.

The record shows that Harris made homestead application for this land September 16, 1893, and that his application was received at the local office by mail at twenty minutes past one o'clock P. M. of September 16, 1893, and that it was rejected by the local officers; that McMillan, on the 29th of the same month, applied to make homestead entry for the same tract, and that his application was rejected by the local officers; that Charlie Rider, on October 17, 1893, made application by mail to enter said land, and that his application was rejected by the local officers; that on December 1, 1893, Edmund N. Williams made application to enter said land, and that his application was suspended to await action on prior applications; that on September 27, 1894, Irvin Pitman made application for said tract, and that his application was rejected for conflict with prior applications.

A hearing was ordered by your office to determine the rights of these parties, and on the day set for the hearing, after several continuances, McMillan and Harris appeared in person and by attorney, but Pitman, Rider and Williams made default and their applications and contests were dismissed and the case was closed as to them.

The local officers, on January 27, 1897, upon considering the case of McMillan and Harris found that McMillan settled on the land in controversy on September 16, 1893, and began his improvements; that he moved his family upon the land on November 14, 1893, and that since then he has resided upon the land and cultivated the soil; that he induced one Andy White to go into the Cherokee Outlet on Friday evening prior to the opening, together with his (McMillan's) brother-in-law and other parties, and that White and his companions, as instructed by McMillan, were to go to a point, near the "Round Grove" in the Chikaskia river bottom, locate certain claims, take possession of them, and hold them by keeping other parties off them, until McMillan and one Pardoe reached the claims on the day of opening, in violation of the law and of the President's proclamation; and they rejected his application to make entry. They recommended that Harris be allowed to make entry of the land.

From this decision McMillan appealed, and your office affirmed said decision as to McMillan, but reversed the judgment of the local officers as to Harris and rejected his application to enter said land. McMillan and Harris have appealed to the Department.

The testimony relating to McMillan's settlement shows that McMillan accompanied by six others made the race for the land from the Kansas line on the day and hour of opening; that he and one Beckwith rode together to the land or its vicinity. McMillan (in his testimony) says he saw a young man, by the name McGraw, on the land at the time he set his stake, and that McGraw is his brother-in-law; that he also saw a man named Andy White. Asked on cross examination how he came to meet McGraw and White in the Chikaskia bottom that afternoon, he replied that he could not tell. He said that Pardoe

started with him in the race, and stopped on the claim, and that McGraw was there when they reached the land. He admitted that White and McGraw had been with him for three or four days before the day of opening and had traveled with him to "the line" at the opening, but said he did not know how they entered the Strip on the day of the opening, or how they came to be there.

Andy White, who testified for Harris, swore that McMillan employed him to go into the Cherokee Outlet and hold down a claim in the Round Grove bottom on the Chikaskia river for him until he could reach it on the day of the opening. He said that for this he was to be paid $150 by McMillan; that McMillan's brother-in-law Archie McGraw accompanied him; that they went into the Outlet on Friday night and got to the Round Grove on Saturday morning, the day of the opening, at between eight and nine o'clock, and held the claims down until McMillan and his friends came in; that McGraw rode a horse belonging to McMillan; that McMillan gave him his revolver and belt and McGraw his watch and furnished them with provisions; that McMillan and his companions arrived on the land they were holding down, at about three o'clock on Saturday, the day of the opening.

G. A. Willett, who testified for Harris, swore that McMillan told him he had made arrangements with Andy White and Archie McGraw to go into the Cherokee Outlet before the opening and "stake claims for them," and that he wanted witness to go with them and said he would pay him one hundred dollars for it; that afterwards McMillan said "the other boys had got out of the notion to come in on these terms," and he (witness) did not go.

W. G. Pardoe, who was examined for McMillan, swore that he was a lawyer and knew White and that he found White located on the NW. ¼ of Sec. 17, directly west of the land in controversy, and that he paid White twenty dollars at the time, and twenty dollars afterwards for the claim, but that he did not pay him anything for McMillan, and that White was not located on the land in controversy. On cross-examination he said that he understood that McGraw rode McMillan's horse; that White was pointed out to him by McMillan as a "sooner;" that he paid him twenty dollars and later ten dollars for the land he settled on and agreed to pay him seventy dollars more if he should obtain a good title to the land without trouble; that he heard through McMillan that he (McMillan) "knew of some fellows who were going to 'sooner' claims on the strip," and going to hold them down to sell out to others and not for the purpose of filing on them, and that he (witness) was anxious to make the run with McMillan so that he might point out one of these "sooners" to him, if they could find them in time; that when he arrived in the vicinity of the land McMillan told him "that there was a fellow over there—pointing south—wearing his (witness') revolver and belt, and to go over and get in with him, as he was one of the 'sooners' he had previously spoken of," and that he went to the place and found White there.

McMillan, in rebuttal, denied positively that he had any contract with White, or any other person, to enter the Outlet before the day of opening and hold down a claim for him.

It was held in Hawkins *v.* Covey, 17 L. D., 175, that (syllabus):

The statutory disqualification imposed upon persons entering the territory of Oklahoma prior to the time fixed therefor extends to one who thus enters said territory for the purpose of securing information that would give him an advantage over other applicants, though he subsequently returns to the "line" and there awaits the signal for entrance, and ultimately does not settle on the tract first selected.

And in Kollar *v.* McDade, 21 L. D., 153, it was held that (syllabus):

Where the evidence shows that the claimant was within the Territory during the inhibited period, it is incumbent on him to show that his purpose was not to acquire an advantage over others, and in fact did not.

In Blanchard *v.* White, 13 L. D., 66, it was held that:

The disqualification imposed by the statute, extends to an applicant who remains outside of said Territory until noon of April 22, 1889, but seeks to evade the prohibitory operation of the statute through the assistance of another whom he has heretofore employed to enter said Territory for such purpose.

In Guthrie Townsite *v.* Paine, Id., 562, it was held that:

A settler on Oklahoma land cannot evade the prohibitory effect of the statute, with respect to entering said Territory, through the assistance of one who enters the same prior to the time fixed therefor.

And in White *v.* Marvel, 18 L. D., 560, it was held (syllabus):

An entry of Oklahoma land made through the assistance of another, who enters the Territory in violation of law and holds the land until such time as the claimant makes entry thereof, is illegal, and must be canceled.

It is shown by the weight of the evidence that McMillan employed White and his brother-in-law, McGraw, to enter the Cherokee Outlet the day before the day of opening to hold down lands for him and others, and that they entered the Territory, pursuant to the agreement, and although it is not shown that the particular quarter section on which McMillan settled was occupied by either of the conspirators, that is immaterial. In the case of Hawkins *v.* Covey, above cited, it was held that although Covey did not settle upon the tract which he first selected, as his purpose in going into the Territory on the day before it was opened to settlement was undoubtedly to obtain information that would give him an advantage over others, who likewise contemplated entry, he was disqualified.

Your office decision affirming the judgment of the local officers and dismissing McMillan's application to enter is affirmed accordingly.

Harris presents a different case. There is no evidence to support your finding of fact in relation to the means by which Harris's application to enter this land was mailed at the Perry post office. The only evidence on the subject of his application is contained in the deposition of B. N. Woodson, a witness for McMillan, who testified to the effect that on September 16, 1893, he was probate judge of "K" county, Oklahoma Territory, and that as such officer, between the hours of four and

five o'clock in the morning of September 16, 1893, he swore certain parties to their homestead affidavits in "K" county, Oklahoma Territory, on the hundred foot strip on the north boundary of said Territory, a short distance west of the Atchison, Topeka and Santa Fe railroad, and that he swore no other persons that he remembered at any other time or place on said 16th day of September, 1893. This is the sum of the evidence adduced.

In the case of Parker *v.* Lynch, 20 L. D., 13, it was held that (syllabus):

A homestead entry allowed on papers executed prior to the time when the land is open to entry may be amended by supplying a proper affidavit, or the defect treated as cured, in the absence of any adverse claim, by the subsequent allowance of a commuted cash entry thereof for townsite purposes, and payment thereon.

In the present case, as it is held that McMillan is disqualified to make entry, there is no adverse claim, and Harris should be allowed to make entry of the land. Your office decision in regard to Harris is therefore reversed.

RAILROAD GRANT—INDEMNITY SELECTION—APPLICATION TO ENTER.

HAGEN *v.* HASTINGS AND DAKOTA RY. CO.

Under the provisions of the circular of September 6, 1887, governing the procedure in cases of application to enter land covered by indemnity selections, a hearing will not be ordered, where the applicant makes a *prima facie* showing that the land applied for was not subject to such selection, and the company does not, in its protest against the allowance of the entry, traverse the allegations made by the applicant.

Secretary Bliss to the Commissioner of the General Land Office, December 20, 1898.

(W. V. D.) (F. W. C.)

An appeal has been filed on behalf of the Hastings and Dakota Railway Company from your office decision of June 23, 1898, in the matter of the case of Knudt Hagen against said company, involving the NE. ¼ of Sec. 35, T. 120 N., R. 40 W., Marshall land district, Minnesota, in which the showing filed on behalf of Hagen, accompanying his homestead application filed on April 14, 1894, was held to be sufficient to evidence a claim to the land prior to the company's selection of October 29, 1891, and the selection list of that date was accordingly held for cancellation as to the tract here involved with a view to allowing Hagen's homestead application.

This tract is within the indemnity limits common to the grants for the St. Paul, Minneapolis and Manitoba Railway Company (main line) and the Hastings and Dakota Railway Company. The respective claims of said companies within such indemnity limits were considered in departmental decision of October 23, 1891 (13 L. D., 440), in which the rejection of the attempted selection by the Hastings and Dakota Railway Company, on May 26, 1885, of certain lands within such conflicting

limits, including the tract here in question, was affirmed, and in view of departmental order of May 22, 1891, (12 L. D., 541), revoking the indemnity withdrawal ordered on account of this grant, the land was held to be subject to selection by the company upon presentation of a proper list, or to settlement and entry by the first qualified party.

Following said decision of October 23, 1891, a selection list was filed on behalf of the Hastings and Dakota Railway Company on the 29th of that month, which list included the tract here in question.

On April 14, 1894, Hagen filed in the local office his application to make homestead entry of this land, accompanying the same by his corroborated affidavit, from which it appeared that he settled on the land in the spring of 1887 and established residence at the same time, which continued up to the date of his application, and that he was actually residing on the land in a house on October 29, 1891, the date of the presentation of the list of selections above referred to. His improvements consisted of a house, barn, granary, fences, and twenty acres cultivated, all of the value of about two hundred dollars.

In accordance with the circular of September 6, 1887 (6 L. D., 131), it appears that notice was given the company of Hagen's application and that it duly filed a protest against the acceptance of the same, setting up a claim to the land under its attempted selection of May 26, 1883, before referred to, but in no wise traversing Hagen's allegation of settlement and continuous residence preceding the selection of October 29, 1891. Your office decision therefore ruled that a hearing was unnecessary, and held the company's selection for cancellation with a view to allowing Hagen's application, referring to departmental decision in the case of Vanderberg *v.* Hastings and Dakota Ry. Co. *et al.* (26 L. D., 390), as authority therefor.

From said decision an appeal has been filed on behalf of the company, and from an examination of the same it would appear that the several grounds of error were duly considered and disposed of in the case of Vanderberg *v.* Hastings and Dakota Railway Company (*supra*), with the exception of the third, which urges "error in holding that hearing is unnecessary to determine the facts alleged *ex parte* by said Hagen with respect to his settlement and claim."

The circular of September 6, 1887, above referred to, provides:

> Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of said filing or entry.
>
> Should the company fail to respond or show cause before the district land officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same which will be determined by the register and receiver, subject to the right of appeal in either party.

Under this circular it will be seen that unless the company appears and shows cause why a tendered application to file for or enter lands included within its indemnity selection lists should not be allowed, a hearing will not be necessary, but the application will be allowed and the company's selection canceled.

As before stated, the company was duly advised of Hagen's application, and protested against its allowance, but the protest failed to adverse the matters set forth in the affidavit filed in support of Hagen's application, which are held to evidence a claim prior to the company's right under its selection list then pending. The grounds depended upon were that the company's selection of May 26, 1883, was a valid selection, and that its grant was notoriously deficient at the time of Hagen's alleged settlement.

All claim under the proffered selection of May 26, 1883, was disposed of in the decision of October 23, 1891 (*supra*). Further, before revoking the indemnity withdrawal the company was called upon to show cause why the same should not be revoked, and responded thereto, which showing was considered at the time of the rendition of departmental decision of October 23, 1891 (*supra*), under which the withdrawal of indemnity lands was revoked. The company must therefore stand upon its selection of October 29, 1891, and as the showing filed on behalf of Hagen evidences that he was a qualified settler upon the lands prior to the presentation of said list, which fact was not disputed by the company at the time an opportunity was afforded therefor, it must be held that no error was committed by your office in acting upon said showing and in holding that such showing evidenced a claim prior to the company's selection.

Your office decision is therefore affirmed, and upon completion of entry by Hagen within a reasonable time to be allowed by your office the company's selection will be canceled.

SETTLEMENT RIGHT—DISQUALIFICATION OF SETTLER.

GOURLEY *v.* COUNTRYMAN.

The priority of a settlement right as against an existing homestead entry is forfeited, where the settler subsequently, through the acquired ownership of other land, becomes disqualified as a claimant under the homestead law.

A final certificate for one hundred and sixty acres invests the holder with a fee simple title thereto, and, under the provisions of section 20, act of May 2, 1890, operates to disqualify him as a homestead claimant.

Secretary Bliss to the Commissioner of the General Land Office, December 21, 1898.

(W. V. D.) (L. L. B.)

Wm. Gourley has appealed from your office decision of July 6, 1898, dismissing his contest (alleging prior settlement) against the entry of George W. Countryman, made July 26, 1895, for the N ½ of the NW ¼ of Sec. 28, T. 11 N., R. 3 W., Oklahoma, Oklahoma.

The antecedent history of this litigation may be found in Pence *v.* Gourley, 18 L. D., 358; Gourley *v.* Countryman, 24 L. D., 49, and same on review, id. 342, and briefly epitomized is as follows:

May 11, 1889, A. G. Blauvelt made homestead entry for the land here involved.

October 17, 1889, Gourley filed contest against Blauvelt's entry, charging that he had relinquished and abandoned the land.

September 30, 1890, Thomas W. Pence also filed contest against Blauvelt's entry, charging relinquishment of the same to Gourley prior to Gourley's contest, and that Gourley was holding the said relinquishment for sale or to await his convenience to make entry for the land, and that the contest of Gourley was speculative and fraudulent. On December 1, 1891, Gourley filed Blauvelt's relinquishment and made entry of the whole quarter section.

By the decision above cited in 18 L. D., the contest of Pence was sustained, and thereupon Pence, on February 14, 1895, made homestead entry of the said land.

July 26, 1895, Pence relinquished and George W. Countryman, defendant herein, entered the same.

Gourley having been in possession of the tract during all this time, on October 15, 1895, filed contest against the entry of Countryman, alleging settlement at the date of Countryman's entry, and that Pence and Countryman were in collusion for the purpose of acquiring his improvements, and later asked that his entry (which prior to cancellation on the said contest of Pence embraced the whole quarter section) be reinstated.

Your office reinstated his entry as to the south half of said quarter section, but refused his application as to the north half and denied him a hearing on his contest against Countryman.

By departmental decision of January 18, 1897, 24 L. D., *supra*, your action in refusing his application to have his entry reinstated as to the land here in dispute was affirmed, but a hearing was ordered on Gourley's allegation of settlement, also the allegation charging conspiracy between Pence and Countryman.

Such hearing was duly had, and the register and receiver, December 20, 1897, found that Gourley was the owner of the SE¼ of Sec. 8, T. 123 N., R. 62 W., in Brown county, South Dakota, on July 26, 1895, when Countryman made his entry, and recommended the dismissal of his contest.

By your office decision Gourley was found not to be the owner of said SE¼, but that on October 15, 1895, the date of his contest, he was the owner of the NW¼ of the same section, and disqualified by such ownership from sustaining his claim to the land in controversy.

There was no evidence introduced sustaining the charge of conspiracy between Pence and Countryman.

Gourley showed that since 1889 he had been in the occupation of the

south half of this quarter section and about ten acres of the north half and had some improvements on said north half.

To show the disqualification of Gourley, Countryman offered in evidence a certified copy of a patent issued to Gourley December 4, 1895, for the NW¼ of Sec. 8, T. 123 N., R. 62 W., in South Dakota, containing one hundred and sixty acres of land; also copy of his final proof under the timber culture law for said land, submitted August 14, 1895; also a certified copy of a patent for the SE¼ of the same section issued the 10th day of June, 1882, and containing one hundred and sixty acres of land.

Gourley admits receiving the said patents, but claims to have sold the said SE¼ to Eugene A. Conant, in March 1891, and that he conveyed said NW¼ to Peter Worges, his wife's brother, within a day or two after making his final proof August 14, 1895.

Countryman claims that both these deeds were fraudulent; that the sales were without consideration and were made not to transfer but to cover up the true ownership of the land.

A great volume of testimony was introduced for the purpose of showing that these claimed transfers were mere pretexts, all of which in the opinion of this Department was unnecessary, in view of the admission of Gourley that he received final certificate for said NW¼ of Sec. 8 in South Dakota, August 14, 1895.

While he held that certificate he was the owner of one hundred and sixty acres of land, and was during that time disqualified from claiming the tract in dispute, by settlement or otherwise.

His contest is based upon his settlement prior to the entry of Countryman. Countryman's entry was made July 26, 1895, and was valid against all claims except the alleged prior settlement claim of Gourley. His entry was existing August 14, 1895, when Gourley became disqualified to make or maintain settlement by reason of his then ownership of one hundred and sixty acres of land in South Dakota.

At the instant Gourley received his said final certificate the superior right of Countryman attached by reason of his entry which was no longer assailed by the claim of a qualified settler.

It is contended by counsel for Gourley that final certificate does not invest the holder with a fee simple title, such as contemplated in Sec. 20 of the act of May 2, 1890 (26 Stat., 81).

This contention can not be sustained. At common law the owner in fee simple of land was such an owner as had full disposal of the title during his lifetime and upon whose death the absolute title descended to his heirs.

That the holder of a final certificate may dispose of the land covered thereby has been held so often by this Department that a citation of authorities need not be made. See also Myers *v.* Croft, 13 Wall., 291; and that the ownership passes to his heirs at his death is equally as well settled.

Pending the consideration of this case Countryman has filed an application to amend his entry so as to embrace the south half of the quarter section. As to this application it is sufficient to say that as the said south half is embraced in the entry of Gourley, now of long standing and which has not been assailed, the same must be rejected.

The decision of your office dismissing the contest of Gourley is affirmed, and the application of Countryman to amend his entry is denied.

OKLAHOMA LANDS—QUALIFICATIONS OF ENTRYMAN.

BRADBURN *v.* LOWE.

The disqualification of a homestead claimant in Oklahoma, arising from the ownership of other land, is limited to ownership in fee simple, and does not extend to a legal title held in trust for the benefit of another.

Secretary Bliss to the Commissioner of the General Land Office, December 22, 1898.

(W. V. D.) (A. B. P.)

This is an appeal by J. W. Bradburn from your office decision of July 1, 1897, affirming the finding of the local officers and dismissing his contest against the homestead entry of Samuel Lowe, made October 31, 1891, and commuted to cash entry May 26, 1893, for the N. ½ of the NE. ¼ of Sec. 17, T. 6 N., R. 5 E. (not the NW. ¼ of the said section, as stated by your office and the local office), Oklahoma land district, Oklahoma Territory.

While the appeal contains several specifications of error, only one material question is really presented thereby, namely: Was Samuel Lowe, at the time he made said entry, disqualified by reason of being the owner in fee simple of one hundred and sixty acres of land in the State of Kansas? It is not contended, except in a general way, that your office decision is in error in any other essential matter.

The evidence shows that Julia A. Lowe, aged sixty-nine years, wife of the entryman, aged seventy-one years, at one time owned in her own right eighty acres of land in the State of Indiana, which land was purchased with money given to her by her father. In the year 1888 Mrs. Lowe traded the eighty acres of land in Indiana to Granville Edwards for two hundred and forty acres of land in Dickinson county, Kansas. It appears that the deed for the Kansas lands was made by Edwards to Julia A. Lowe and Samuel Lowe, the latter being the entryman and contestee herein. It does not appear that there was any other consideration for the said conveyance than the eighty acres of Indiana lands which belonged to Mrs. Lowe.

It further appears that on September 18, 1893, the Union Pacific Railroad Company conveyed to Samuel Lowe eighty acres of land situated in Dickinson county, Kansas. Lowe owned this land in his own right at the date of his commuted entry, but neither at that date nor

at the date of his original entry did he own any other lands in his own right, so far as appears from the record.

It further appears that in 1895 Julia A. Lowe conveyed to her son, Samuel F. Lowe, one hundred and sixty acres of the two hundred and forty acre tract above mentioned by two deeds of conveyance, in both of which her husband, Samuel Lowe, united, but in one of which the eighty-acre tract owned by the latter was also conveyed.

According to the testimony of Julia A. Lowe and her husband, the latter was never the owner of any part of the two hundred and forty acre tract for which the Indiana lands were traded as aforesaid. Their testimony is to the effect that neither knew until after this contest was brought that the Edwards deed for the two hundred and forty acres of land was made to them both. It does not appear why this was done, and it is very evident that it was not done at the request or instigation of either Mrs. Lowe or her husband. The subsequent dealings with the land, as shown by the record, clearly indicate that no claim was asserted to any part thereof by Samuel Lowe as against the ownership of the whole by his wife. It is shown that the lands were always treated as belonging to Mrs. Lowe in their entirety and all tax assessments were made out in her name.

It is clear from the whole record that said tract of two hundred and forty acres of land was in fact the property of Mrs. Lowe and that her husband was not the owner of any part thereof. It was not subject to his control or disposition, and so far as the legal title rested in him under the deed conveying the same jointly to his wife and himself, he must be considered as holding such title in trust for the benefit of his wife. It can not be considered that he was the owner in fee simple of any part of the two hundred and forty acres of land at the date of the entry in question.

It is contended that the fact of his having signed the deeds conveying one hundred and sixty acres of said two hundred and forty acre tract to Samuel F. Lowe is evidence of ownership therein, but this contention is without merit, for the reason that by one of the deeds the tract owned by himself was conveyed, and for the further reason that it was probably necessary for him to sign the deeds in order to convey a complete and perfect title to the land.

Upon the whole record it must be held that the evidence does not show the entryman to be disqualified as alleged in the affidavit of contest. The contest must therefore be dismissed. The decision appealed from is affirmed.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

RAY ET AL. *v.* GROSS.

In determining whether an applicant for patent under section 4, act of March 3, 1887, is a purchaser in good faith, the Department may properly consider certified copies of deeds tendered in evidence, even if said deeds were irregularly placed of record, and hence not conclusive as articles of conveyance.

A remote purchaser in good faith of lands erroneously certified on account of a railroad grant, who buys without any knowledge of defect in the title thereto, is entitled to patent under section 4, act of March 3, 1887, irrespective of any question as to the good faith of the immediate purchaser from the company.

Secretary Bliss to the Commissioner of the General Land Office, December 22, 1898.

(W. V. D.) (C. J. W.)

William H. Gross, claiming to be a purchaser in good faith of certain lands within the limits of the grant of June 3, 1856 (11 Stat., 17), to the State of Alabama, for the benefit of the Mobile and Girard Railroad Company, filed his application for patent for the lands covered by his alleged purchase in the United States land office at Montgomery, and gave notice of his intention to offer proof of his claim under the 4th section of the act of March 3, 1887 (24 Stat., 556).

John H. Ray and nineteen others (some claiming as entrymen and others as settlers on lands embraced in Gross's application for patent) filed protests against the issuance of patent for the tracts claimed by them, respectively, and when Gross offered his proof were represented by counsel and cross-examined his witnesses.

After the proof was all in, on September 15, 1897, the local land officers, successors of those before whom the proof was made, rendered a decision, in which they reached the conclusion that Gross was not a purchaser in good faith within the meaning of the 4th section of said act of March 3, 1887, from which Gross appealed, and on June 4, 1896, your office reversed the local officers, and several of said settlers have appealed to the Department from your office decision.

It appears that the lands in question, on April 26, and May 31, 1860, were certified to the State of Alabama under the grant referred to, for the benefit of the Mobile and Girard Railroad Company, and, on April 24, 1893, when the rights of said company were adjusted under the forfeiture act of September 29, 1890 (26 Stat., 496), it was found that the lands so certified were in excess of the quantity earned by the company by the construction of its road from Girard to Troy, a distance of eighty-four miles, and were excluded from said adjustment and from the recertifications that were made under the forfeiture act.

On July 19, 1893, as reported by your office, after due notice by publication, the lands in question, together with others, were restored to the public domain. The applicant here, claiming to be a purchaser in good faith, relies upon section four of the act of March 3, 1887, afore-

said, as the authority upon which he may rightfully obtain patent. Said section is as follows:

That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

Gross claims to have been a purchaser in good faith and for a valuable consideration of the lands applied for after they had been certified to the State for the benefit of said company and sold by the company to parties through whom he claims. His proof consists of both oral and documentary evidence. The documentary evidence consists of certified copies of deeds of record in the proper courts of the State where the land lies, which purport to show that Gross is the remote assignee of Abraham Edwards, who was the original purchaser of the lands from the railroad company, on January 21, 1871, and that Edwards sold and conveyed the same to Charles Ewing on February 6, 1871, and that Ewing sold and conveyed to Gross on January 7, 1882.

The certified copies of the deeds referred to were objected to by counsel for protestants, upon grounds set forth in the record, both in the local office and before your office, and the objection to the admission of these certified transcripts from the records are still insisted upon in the appeal to the Department, which objection will be hereafter referred to more explicitly. The oral evidence offered by the applicant tends to show the fact of the purchase by him of said lands from Ewing, that they were purchased in good faith, and the consideration paid therefor was ten thousand eight hundred dollars; that no part of the consideration paid by him has been refunded to him or to any one for him.

It further appears that neither Gross nor any one through whom he claims has instituted proceedings against the railroad company for the

recovery of any part of the purchase money, and that there are no persons of the first class, under the 3d section of the act of March 3, 1887, entitled to the right of entry under the pre-emption or homestead laws, claiming any of said lands; and, in connection with this matter, the records of filings and entries at the Montgomery land office were offered in evidence.

The testimony offered by protestants tended to show bad faith on the part of Edwards, the first and original purchaser of the lands from the railroad company, but none was offered tending to impeach the good faith of Gross, who testified that at the time of his purchase he was not acquainted with Edwards and had no knowledge of how he acquired the lands.

Your office did not enter into the consideration of the record with a view to determining whether or not Edwards was a purchaser in good faith, and it is not deemed necessary to do so here, since a finding upon that matter alone would not be conclusive of the case.

Waiving for the present the consideration of the objections to the admission of a part of the proof offered, it may be stated: First. That it is satisfactorily shown that there are no *bona fide* settlers whose homestead or pre-emption entries have been erroneously canceled on account of a railroad grant or withdrawal in this case. Second. That Gross appears to be a purchaser in good faith of the lands applied for. Third. That none of the protestants show any claim to any of the tracts by settlement or entry prior to the date of the purchase by Gross.

There remain for consideration the exceptions taken to the admission of certified copies of the deeds referred to and the contention that it was incumbent on Gross to show that Edwards, the first purchaser from the company, purchased in good faith.

The objections to the admission of certified copies of the deeds offered by Gross are technical, and do not go to the merits of the case. If it were conceded that they were irregularly admitted to record, and not conclusive as deeds of conveyance, they are nevertheless such evidence of a contract between the parties, in writing, in reference to the land in question, as may be considered in determining whether or not the applicant was a purchaser in good faith of lands sold by the railroad.

The objection to the deeds from the railroad company to Edwards, and from Edwards to Ewing, on the ground that they were not recorded within twelve months from date, is without force, as they were recorded before protestants predicated any rights, but they do not claim under these parties, and make no averment that the papers are not genuine. The deed from Ewing and wife to Gross, which was of record in the proper offices, negatives the idea of intention to conceal his claim, and no mere irregularity in the proceedings can defeat his rights as a purchaser in good faith, if he appears from proof satisfactory to the Department to be such purchaser.

The evidence in the case seems to show clearly that the railroad sold the lands in question after they had been erroneously certified to the State for the benefit of said company, and that they were afterwards contracted for and paid for by Gross without any knowledge of a defect in the title. The object and purpose of the applicant in offering in evidence certified copies of certain deeds were evidently not so much to show that he had title, as simply to show that he had acted in good faith in trying to obtain title. See the case of Austin *v.* Luey *et al.* (21 L. D., 507.)

The question, then, to be decided is, whether or not Gross is a purchaser from the railroad company in good faith within the meaning of the act of March 3, 1887, he being not the immediate, but the remote, purchaser from said company.

The local officers seem to have been of the opinion that, as matter of fact, Edwards, the first purchaser, had such knowledge of the condition of the affairs of the railroad company at the time of his purchase as to taint it with bad faith, and that as matter of law the good or bad faith of the first purchaser under said act is to be imputed to subsequent purchasers.

Such is not the interpretation placed upon the law by the supreme court. That court, in the case of United States *v.* Winona, etc., Railroad (165 U. S., 463), interpreting the act of March 3, 1887, held:

> Section 4 of the same act, expressly referring to all other lands certified or patented to any railroad company, provides that citizens who had purchased such lands in good faith should be entitled to the lands so purchased and to patents therefor issuing directly from the United States, and that the only remedy of the government should be an action against the railroad company for the government price of similar lands. It will be observed that this protection is not granted to simply *bona fide* purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a *bona fide* purchaser, to wit, good faith. It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the government a simple claim for money against the railroad company. It will be observed that the technical term "*bona fide* purchaser" is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one who in good faith has made an absolute purchase from a railroad company protection to his title irrespective of any errors or mistakes in the certification or patent.

Under this interpretation of section 4 of said act, and the facts disclosed by the record, Gross is entitled to patent for the land applied for, and your office decision is affirmed.

ALIENATION—HOMESTEAD—SECTION 2290 R. S.

CUMMINS *v.* CRABTREE.

An agreement entered into between an entryman and an adverse claimant, whereby the entryman, for the purpose of avoiding a contest, undertakes to relinquish a specified part of the land covered by his entry, is not in violation of section 2290 R. S., as amended by the act of March 3, 1891.

Secretary Bliss to the Commissioner of the General Land Office, December 24, 1898.

(W. V. D.) (W. A. E.)

The defendant in the case of Jhilson P. Cummins *v.* John S. Crabtree has appealed from your office decision of March 19, 1897, holding for cancellation his homestead entry, made September 23, 1893, for the SE. ¼ of Sec. 24, T. 22 N., R. 7 W., Enid, Oklahoma, land district.

September 30, 1893, Cummins filed an affidavit of contest against said entry, alleging prior settlement, and on April 1, 1894, he filed an amended affidavit of contest, alleging, in addition to his former charges, that on September 25, 1893, Crabtree

entered into a written agreement to relinquish eighty acres of said land in one hundred days from that date, for a consideration of $100, which was to settle the settlement rights of this affiant and D. W. Marshall, who claimed to be the first settler on the land, and said Crabtree agreed to allow said affiant to file on said eighty acres, which he now refuses to do, thereby perpetrating a fraud on said affiant and D. W. Marshall.

A hearing was had December 9, 1895, and on June 4, 1896, the local officers recommended that the contest be dismissed and the entry held intact. On appeal, however, your office held the entry for cancellation on the ground that said entry was not held for the sole benefit of the entryman, but for the use and benefit of himself and Cummins.

It appears that Cummins, Crabtree, and one D. W. Marshall were settlers on this land. Crabtree made entry of the tract and Cummins and Marshall were about to file affidavits of contest against him when a compromise was made between them. By the terms of an agreement entered into and signed September 25, 1893, Crabtree was to relinquish eighty acres in one hundred days from date in order that Cummins might make entry thereof, and Cummins and Crabtree together were to pay Marshall one hundred dollars to abandon all claim he might have to land. This agreement and the note given to Marshall to secure the payment of the one hundred dollars were introduced in evidence and read as follows:

ENID, OKLAHOMA TERRITORY, *September 25, 1893.*

I, John S. Crabtree, hereby agree to relinquish to J. P. Cummins the eighty acres he may select, running east and west, in one hundred days from this date: the land referred to is the SE. ¼ of Sec. 24, T. 22, R. 7 W., I. M.; and should there be a contest, the said J. P. Cummins agrees to render the said John S. Crabtree all the assistance he can in defeating said contest, and D. W. Marshall agrees to render said Crabtree all the assistance he can to defeat said contest; and it is understood that said Crabtree relinquishes this land to avoid a contest.

JOHN S. CRABTREE,
J. P. CUMMINS,
D. W. MARSHALL.

ENID, OK. TY., *September 25, 1893.*

I, J. P. Cummins, promise to pay to D. W. Marshall the sum of one hundred dollars in one hundred days from this date, provided there is not a contest successfully filed on the SE. ¼ of Sec. 24, T. 22 N., R. 7 W., otherwise than by himself, and should there be a contest filed by some other person, the amount paid out to defeat said contest is to be deducted from said note. This note is not to be transferred, and the signers to this note agree to act in good faith and not procure anyone to file a sham contest, and the said D. W. Marshall agrees to render all the assistance he can, if there is a contest filed on said land.

J. P. CUMMINS, *Prin.*
J. S. CRABTREE.

It is alleged that there was also an understanding between the parties that Cummins should file his affidavit of contest against Crabtree's entry in order to forestall like action on the part of others, and that in accordance with this understanding Cummins did, on September 30, 1893, file affidavit of contest alleging prior settlement.

At the expiration of the hundred days mentioned in the contract Cummins called upon Crabtree to perform his part of the agreement, but the latter repudiated the contract and refused to relinquish any portion of the land, whereupon Cummins filed his amended affidavit of contest. Crabtree admits having entered into the contract, but says that it was for the purpose of avoiding a contest and that Cummins violated the contract by instituting a contest a few days after the contract was made. He denied that there was any understanding between himself and Cummins that this contest should be filed to forestall other possible contests. In the light of the two instruments, hereinbefore quoted, both signed by Crabtree and Cummins, it is clear that Crabtree's present statement is untenable and that it was contemplated by them that Cummins should institute such a contest.

The testimony shows that Crabtree followed up his settlement by the establishment of residence within a reasonable time and that he has cultivated and improved the land. Cummins made some improvements on the land in September, 1893, but subsequently abandoned his settlement. He alleges that Crabtree threatened him with bodily harm if he remained on the land, but this is not sustained by the evidence. It is not necessary, then, to go into the question of priority of settlement, as it has been held that a contest against a homestead entry on the ground of prior settlement must fail if it appears that the contestant's alleged acts of settlement were not followed up by the establishment and maintenance of residence. Benjamin *v.* Eudaily, 25 L. D., 103; Thompson *et al. v.* Craver, id., 279.

As the case is now presented to the Department the only question for decision is whether the contract entered into by Crabtree on September 25, 1893, rendered his entry illegal.

Section 2290 of the Revised Statutes, U. S., as amended by the act of March 3, 1891 (26 Stat., 1095), reads as follows:

That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of

actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars, when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified.

It is clear that if Crabtree had entered into an agreement whereby the title which he might acquire from the government should inure, in whole or in part, to the benefit of Cummins, his entry would thereby have been rendered illegal, even though the agreement was made to avoid a contest. Meal *v.* Donahue, 24 L. D., 155. It is to be observed, however, that the arrangement between Crabtree, Cummins and Marshall was not made and was not in contemplation, until after the allowance of Crabtree's entry, and Crabtree did not agree to convey any portion of the land to Cummins or to acquire title thereto for Cummins' benefit. The contract was to relinquish eighty acres within one hundred days from the date thereof. A homesteader has the right to relinquish at any time either the whole of the land embraced in his entry or any legal subdivision thereof, but such a relinquishment runs to the government. It can not be made to any person, and the statement in a relinquishment that it is made for the benefit of anyone is mere surplusage. Jonathan K. Cox, 13 L. D., 638. Had Crabtree relinquished eighty acres in accordance with his contract, the land so relinquished would have been open to entry by the first legal applicant and Cummins's contract with Crabtree would not have given the former any preference right to the land. As the statement in a relinquishment that it is for the benefit of a certain person is without effect, so the statement in an agreement to relinquish that the relinquishment is to be made for the benefit of a certain person is equally without effect.

It does not appear, then, that the agreement entered into by Crabtree comes within the inhibition of the statute quoted above.

The Department has no means of enforcing this contract and it is doubtful whether an agreement like this, intended to restrain and defeat all contests, meritorious or otherwise, by persons not parties to the contract, ought to be recognized even if the Department had the power to do so.

Your office decision is hereby reversed. Cummins's contest is dismissed, and Crabtree's entry is held intact, subject to compliance with law.

SWEET *v.* BEHAR.

Motion for review of departmental decision of October 25, 1898, 27 L. D., 557, denied by Acting Secretary Ryan, December 27, 1898.

RIGHT OF WAY—STATION GROUNDS—SURVEY.

NEW MEXICO AND ARIZONA R. R. CO.

On application for the approval of a plat showing the location of station grounds, the land involved, though within a partly unsurveyed township, may be treated as surveyed, where it lies within a surveyed townsite, and the survey of said station grounds is duly connected with the public surveys.

Acting Secretary Ryan to the Commissioner of the General Land Office, December 27, 1898. (A. M.)

I have before me your letter of the 9th instant with which you have submitted and recommended the approval of a plat filed by the New Mexico and Arizona Railroad Company under the right of way railroad act of March 3, 1875 (18 Stat., 482).

The plat shows a tract of 19¾ acres within the townsite of Nogales, Arizona, selected by the company for station grounds.

The map of definite location of 27.81 miles of the company's road at this point was approved by the Department on October 28, 1882.

The grounds under consideration lie in the SW. ¼ of section 17, and the NW. ¼ of section 20, fractional township 24 S., R. 14 E., Gila and Salt River base and meridian. While the public surveys have not been extended over this fractional township in whole, the six hundred and forty acres included in the above mentioned townsite have been surveyed and duly connected with the public survey corners of the tier of townships immediately north thereof. The survey of the station grounds is also connected with the surveyed township corners so that its location is fully determined and fixed. Under these conditions, the lands involved may properly be considered as surveyed lands, for the purposes of the railroad right of way act.

Among the papers submitted are affidavits showing that the company's road has long been constructed and that the station grounds have been occupied for nine years past. The town has through W. T. Overton, Mayor, acquiesced in the claim of the company and the Mayor has stated that "the town authorities desire to make no objection, or protest in the matter."

In view of the foregoing I have approved the plat as recommended and return it and the papers herewith.

ISOLATED TRACT—ACT OF FEBRUARY 26, 1895.

FRANCIS ADKINSON.

The words "entered, filed upon, or sold," as used in the act of February 26, 1895, amendatory of section 2455 R. S., refer to an entry, filing, or sale, which has been a subsisting entry, filing, or sale, for the period of three years, and are not applicable to a pre-emption filing that had expired prior to the time when application was made to have the adjacent sub-division sold as an isolated tract.

Acting Secretary Ryan to the Commissioner of the General Land Office, (W. V. D.) *December 28, 1898.*

On July 12, 1897, there was received in the Department the petition of Francis Adkinson, addressed to the Secretary of the Interior, praying him

to recall and vacate his decision in this cause, rendered on the 26th day of December, 1896, affirming the decision of the Hon. Commissioner of the General Land Office, and also the decision made the 10th day of May, 1897, denying a motion for review in said cause.

The petition alleges that the decisions complained of are founded upon an erroneous construction of the proviso in the act of February 26, 1895 (28 Stat., 687), amending section 2455 of the Revised Statutes.

On November 25, 1895, Francis Adkinson applied to have the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 21, township 21 N., range 1 E., Helena land district, Montana, with other tracts therein described, ordered into market under section 2455 of the Revised Statutes of the United States, as amended by the act of February 26, 1895 (28 Stat., 687).

Your office, by letter of December 20, 1895, refused to order the sale, holding that the land was not an isolated tract. On appeal, your office decision was affirmed by the Department by decision dated December 26, 1896 (23 L. D., 590), and on motion for review, it appearing by the records of your office that the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 21, is covered by preemption declaratory statement, No. 6262, made March 23, 1884, alleging settlement March 20, 1884, which expired upon failure to make final proof thereunder within thirty-three months, the Department, on May 3, 1897 (24 L. D., 395), adhered to departmental decision of December 26, 1896.

Section 2455, Revised Statutes, as amended by act of February 26, 1895, reads as follows:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell for less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

This statute authorizes the disposal of disconnected or isolated tracts of less than one quarter section, but a tract does not become thus isolated until the same has been "subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold."

The other three forties in the northwest quarter of section 21, having been filed upon under the preemption law in 1884, the period for making final proof upon such filing expired long before Adkinson's application for a sale of the remaining forty, so that the filing was then known only as an "expired filing."

The words "entered, filed upon or sold" refer to an entry, filing or sale which has been a subsisting entry, filing or sale for the period of three years and not to one which was canceled, rescinded or otherwise terminated before the expiration of that time whereby the land embraced therein became unappropriated public land equally with the adjoining tract or parcel sought to be subjected to sale.

After its expiration the preemption filing upon the three adjoining forties did not constitute even a conditional segregation of the land covered thereby, and they were subject to entry by the first legal applicant, notwithstanding the expired filing. It would be manifestly repugnant to the spirit of the statute to carve out and treat as isolated or disconnected one forty-acre tract in a quarter section, the whole of which is equally unappropriated public land subject to entry under the homestead law.

JURISDICTION OF THE LAND DEPARTMENT—FINAL CERTIFICATE.

JOHN G. BRADY.

The control of the Commissioner of the General Land Office, and of the Secretary of the Interior, over the title to public land does not cease upon the issuance of final certificate; nor does the party to whom such certificate issues secure thereby such a vested right in the land as to preclude these officers from correcting, or canceling the same for error of law or fact.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 27, 1898.* (E. B., Jr.)

John G. Brady has filed a second petition for the exercise of the supervisory authority of the Secretary in the matter of his cash entry No. 10, made May 2, 1894, under sections 12 to 14, act of March 3, 1891 (26 Stat., 1095), for a tract of one hundred and sixty acres of land embraced in survey No. 6½ in the district of Alaska. In its decision of March 4, 1898 (26 L. D., 305), the Department upon careful consideration of the case held that under the provisions of the said act Mr. Brady was entitled to purchase only a certain part of the said tract, amounting to about fifty acres thereof, and required him to have his survey and entry amended accordingly. It was also held therein that there was no authority for accepting in payment for the land, as was

done by the local office and your office, the Treasury certificates issued as evidence of the deposit made to defray the cost of survey of the land. August 30, 1898 (27 L. D., 355), the Department considered and denied a petition by Mr. Brady to be allowed to make further proof and payment for the entire tract under the provisions of the said act as modified by section 10 of the act of May 14, 1898 (30 Stat., 413).

In his present petition Mr. Brady contends, upon the authority of extracts, which he encloses, from certain decisions of the courts, that the local officers having passed upon the question of the amount of land he was entitled to enter, and having accepted payment and issued to him their receipt and certificate for patent, he should be allowed to receive patent for the entire tract.

The decisions cited by Mr. Brady do not support his contention. As hereinbefore referred to and clearly shown in the decision of March 4, 1898, *supra*, lawful payment had been made for only a few acres of the land, the local office having erroneously accepted in payment the certificates of the deposit made to defray the cost of survey. The action of the local land office is always subject to review by the Commissioner of the General Land Office, whose action may, in turn, be reviewed by the Secretary. The control of these officers over the title to public land does not cease upon the issuance of certificate for patent, nor does the party to whom the certificate issues secure thereby such a vested right in the land as to preclude these officers from correcting or even canceling the same for error of law or of fact. The entry in question has received very full and careful consideration by the Department, and no sufficient reason is found for modifying in any way the action heretofore taken.

The petition is therefore denied.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RY. CO.

Under the grant of May 12, 1864, the company earned by construction title to certain lands that were patented to the State, but not to the company; subsequently said company set apart a right of way for its road across said lands, and sold its road, together with said right of way, and thereafter the title to said lands, so earned, was recovered by the United States in a suit to quiet title to lands erroneously patented to the State; *held*, that under section 4, act of March 3, 1887, the purchaser of said railroad and right of way is entitled to a patent for the lands embraced in said right of way.

Acting Secretary Ryan to the Commissioner of the General Land Office.
(W. V. D.) *December 29, 1898.* (E. F. B.)

This is an application under the 4th section of the act of March 3, 1887 (24 Stat., 556), by the Chicago, St. Paul, Minneapolis and Omaha Railway Company, for patent to certain lands in sections 9 and 17, and

the E. ½ of the E. ½ of section 19, T. 97 N., R. 42 W., Des Moines, Iowa, land district. Notice of the company's intention to make proof under said section was published, no objection to the application was presented, and proof was submitted in pursuance of the notice.

The local officers held the proof to be satisfactory but accepted payment from the company for said lands and issued cash certificate and receipt therefor as though the application was made under section 5 of the act.

Your office by letter of February 24, 1898, held that said applicant had no right under section 4 of the act of March 3, 1887, and said entry was held for cancellation. From this decision the company has appealed.

The land in controversy was formerly the right of way of the Sioux City and St. Paul Railroad, through the three odd-numbered sections named, which are within the primary limits of the grant to the State of Iowa, made by the act of May 12, 1864 (13 Stat., 72), to aid in the construction of a railroad from Sioux City in said State to the south line of Minnesota, which grant was by the State conferred upon the Sioux City and St. Paul Railroad Company. The land in sections 9 and 17 and the E. ½ of the E. ½ of section 19, were patented to the State for the benefit of the railroad company, but were never patented to the company by the State. They are along that portion of the railroad which was duly constructed and the completion of which in sections of ten miles each was duly certified to by the governor of the State, and they are also part of the lands recovered by the United States in the suit brought against the Sioux City and St. Paul Railroad Company to recover and quiet the title to lands erroneously patented to the State of Iowa for the benefit of said company. See 159 U. S., 349.

The petitioner claims that it is entitled to a confirmatory patent to the land in question as a purchaser in good faith within the meaning of section 4 of the act of March 3, 1887, *supra*, and in proof of its claimed purchase and the good faith thereof produces the following instruments and deeds of conveyance:

First, an instrument in writing, dated January 5, 1875, whereby the Sioux City and St. Paul Railroad Company and the trustees under its land-grant mortgage set apart the land in controversy with other land "for the perpetual use and occupancy of the said railroad for its road-bed and the necessary lands adjoining and pertaining thereto." This instrument was made a matter of record in the public records of the county where the land is situate, April 6, 1875.

Second, a deed from the Sioux City and St. Paul Railroad Company to the St. Paul and Sioux City Railroad Company, dated September 1, 1879, conveying to the latter company the railroad, "and property used or properly appertaining to said line of road as a railroad."

Third, a deed from the St. Paul and Sioux City Railroad Company, dated May 9, 1881, conveying the same railroad, etc., to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, the petitioner.

These transactions occurred after that portion of the railroad along which the land in controversy is situate had been constructed and had been certified as completed by the governor of the State, and after the sections 9 and 17 and the E. ½ of the E. ½ of section 19, embracing the land in controversy, had been patented to the State by the United States, and before the State of Iowa asserted or declared a forfeiture or resumed title on account of the non-construction of other portions of the said railroad, and before the United States instituted its suit to recover and quiet the title to said lands. In speaking of other lands covered by this grant and occupying a similar status, it was said in the recent case of Schneider *v.* Linkswiller *et al.* (26 L. D., 407)—

> The tract in question was within the primary limits of the grant opposite constructed road, as certified by the governor; was, in fact, of the lands earned by the company, and should have been patented to it. That it was not so patented was the fault of the State authorities who, instead, patented to the company other lands in excess of the quantity it had earned, and the United States subsequently recovered the title to the land in question, because by such patenting of other lands the railroad grant had been fully satisfied.

The act making the grant to aid in the construction of this railroad, unlike other grants of a later period, did not in terms contain a grant of a right of way, except through certain reserved lands as indicated in the last proviso to section one, and even if the act by necessary implication contained a general grant of a right of way, it did not prescribe the extent or width thereof, nor did the map of definite location of the line of said railroad attempt to do so. If there was an implied grant of a right of way over all public lands traversed by the railroad, odd-numbered sections granted to encourage the construction of the road as well as lands retained by the United States, this grant, like the land-grant, was made to the State of Iowa. The patent issued to the State for sections 9 and 17, and the E. ½ of the E. ½ of section 19, conveys a fee simple title to all the lands therein and makes no mention of a right of way. In the suit against the Sioux City and St. Paul Railroad company under the act of March 3, 1887, *supra*, to recover and quiet the title to lands erroneously patented to the State on account of this grant, the government made no exception or reservation of a right of way; the company in its defense made no distinction between the right of way and the granted lands, and the court by its decree absolutely quieted the title of the United States to all of the lands therein controversy including sections 9 and 17 and the E. ½ of the E. ½ of section 19. By this decree the Sioux City and St. Paul Railroad company and the trustees under its land-grant mortgage, were "forever barred and estopped from asserting any right, title, lien or claim to the said lands . . . or any part or portion thereof adverse to the title of the . . . United States of America." The petitioner, the Chicago, St. Paul, Minneapolis and Omaha Railway company, was not made a party to this suit, but at the time of the commencement thereof in October, 1889, it was, and has ever since remained, in the possession and occupation of the land now in controversy under a claim of title resting

upon the conveyances hereinbefore recited. The good faith of the petitioner's purchase thereof seems to be clear.

The first mention of any definite or fixed right of way is found in the land-grant mortgage of the Sioux City and St. Paul company of August 1, 1871, which contains the following reservation:

> Reserving and excepting therefrom, however, for the purposes of a right of way for its railroad, fifty feet in width on each side of the center of its track as now built through said lands; and where said road passes through excavations requiring fences for protection against snow, reserving and excepting a distance not exceeding one hundred feet on each side of the center of the rail track.

Apparently for the purpose of giving still greater certainty to the land reserved by the company for right of way purposes and therefore withheld from sale, the instrument of January 5, 1875, was executed and recorded, whereby the company and the trustees under its land-grant mortgage, set apart certain lands "for the perpetual use and occupancy of the said railroad for its roadbed and the necessary lands adjoining and pertaining thereto," the lands here in controversy being described as follows:

> A parcel of land, commencing at a point in the north boundary of section nine (9) in township ninety-seven (97) north of range forty-two (42) west of the fifth principal meridian, two hundred (200) feet east of the north west corner of said section, thence west to said north west corner two hundred (200) feet, thence south on section line four hundred and eighty (480) feet, thence north easterly to point of beginning, containing one and eight hundredth (1 9-100) acres more or less.
>
> Also a strip or belt of land one hundred and fifty (150) feet wide, being one hundred (100) feet on the north west side of and fifty (50) feet on the south east side of and parallel with the centre line of the Sioux City and St. Paul Road as now constructed over and across sections seventeen (17) and nineteen (19) in township ninety-seven (97) north of range forty-two (42) west of the fifth principal meridian, containing in all, thirty and twenty-four hundredth (30 24-100) acres, more or less.

Thereafter, the company made contracts for the conveyance of the lands in the granted sections traversed by the railroad including sections 9 and 17, and the E. ½ of the E. ½ of section 19, in which contracts the right of way was specifically excepted and withheld. These contracts disclose that in each instance the acreage embraced in the right of way as set apart and defined in the instrument of January 5, 1875, was deducted from the acreage of that subdivision, as shown by the government survey, in stating the acreage intended to be sold by the company and to be paid for by the purchaser.

It would seem to have been unnecessary to grant a right of way over lands like sections 9 and 17 and the E. ½ of the E. ½ of section 19, the entire title to which was granted to aid the construction of the road. A right of way in the sense of an easement presupposes that this right and the land which is servient thereto, do not have a common ownership, and, as a rule, where two estates like these, the one dominant and the other servient, unite in the same owner, the occasion for their separate recognition ceases and the lesser estate merges in the greater one. Here the Sioux City and St. Paul Railroad company, the beneficiary of

whatever grant was made, having, by the construction of this portion of its road fully earned the title to these odd-numbered sections, segregated and set apart for the use of its railroad the land in controversy, and thereafter sold and conveyed the same with its railroad to the St. Paul and Sioux City Railroad company, which, in turn, sold and conveyed the same to the Chicago, St. Paul, Minneapolis and Omaha Railway company. In selling or contracting to sell the remaining lands in said sections they were described as abutting against or bounded by the outer lines of this right of way. It is thus shown to have been the purpose of the Sioux City and St. Paul company to convey, with its railroad, the entire title to the lands set apart by the instrument of January 5, 1875, for a right of way and not a mere easement therein. Under these circumstances and upon the authority of the case of Schneider *v.* Linkswiller (26 L. D., 407) and other like cases, it is held that the petitioner is a purchaser in good faith of the land here in controversy within the meaning of section 4 of the act of March 3, 1867, *supra*, and is entitled to receive a confirmatory patent thereto.

The decision of your office is accordingly reversed.

DESERT LAND ENTRY—ASSIGNMENT—ACT OF MARCH 3, 1891.

GASQUET ET AL. *v.* BUTLER'S HEIRS ET AL.

The provisions of the act of March 3, 1891, amendatory of the act of March 3, 1877, with respect to the assignment of desert land entries, are applicable to an entry made under the original act, but assigned after the passage of the amendatory act, and perfected in accordance therewith.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 29, 1898.* (E. B., Jr.)

It appears in this case that John B. Butler made desert land entry April 2, 1877, of the S. ½ and the NW. ¼ of Sec. 34, T. 26 S., R. 25 E., Visalia, California, land district. Pursuant to departmental direction of September 12, 1877, all desert land entries in the above named land district were suspended by your office September 28, following. They remained suspended thence until the promulgation, February 10, 1891, of the decision of the Department in the case of United States *v.* Haggin (12 L. D., 34), which directed that the suspension be removed. Notice of the removal of the suspension was sent by registered mail to the last known address of the entryman, August 23, 1893. In the meantime, January 1, 1880, the entryman, Butler, had died intestate leaving several heirs. The notice was returned unclaimed.

February 27, 1896, Joseph Gasquet, Eli A. Bonnet and Bruno Bonnet filed a joint affidavit of contest against the entry charging failure to reclaim the land within the time allowed by law. The affidavit was rejected December 7, 1896, by the local office on the ground that the

charge was premature, the period of five years allowed for reclamation, exclusive of the time during which the entry was suspended, not having expired. (Acts of July 26, and August 4, 1894, 28 Stat., 123 and 226.) This rejection was affirmed, in due course, by your office, March 11, 1897, and by the Department September 2, 1897.

February 17, 1896, the heirs of Butler assigned all their interest in the said entry to Arthur Wallace, who submitted final proof July 25, 1896, under the desert land act of March 3, 1877 (19 Stat., 377), as amended by the act of March 3, 1891 (26 Stat., 1095). This proof was approved by the local office March 23, 1897, and certificate for patent was issued to Wallace the same day.

November 9, 1897, the same parties who had filed the previous affidavit filed a second contest affidavit against the entry, repeating therein the charge of non-reclamation and making the additional charges of failure to cultivate the land, and that the entry having been made under the act of 1877, *supra*, the assignment to Wallace was therefore void. February 21, 1898, your office rejected the second contest affidavit, holding the assignment to Wallace to be valid, and that inasmuch as no default or failure had been charged against Wallace, who was furthermore shown by the evidence to have duly complied with the law, the charge against the entryman or his heirs was not material. An appeal by the contest affiants brings the case to the Department.

No reversible error is found in your office decision. The matter of the said assignment, however, should perhaps receive brief consideration herein. Desert land entries controlled by the provisions of the act of 1877, *supra*, have been uniformly held to be non-assignable ever since the decision of April 15, 1880, in the Downey case (7 C. L. O., 26) and to be vitiated and rendered subject to cancellation by attempted assignment (David B. Dole, 3 L. D., 214; Henry W. Fuss, 5 L. D., 167; Circular Instructions of June 27, 1887, ibid., 708; and Haggin *v.* Doherty, 14 L. D., 123). The act of March 3, 1891, *supra*, entitled "An act to repeal timber culture laws, and for other purposes," added five sections, numbered from four to eight inclusive, to the desert land act of 1877. By section seven of these amendatory sections authority is expressly given to issue patent "to the applicant or his assigns," but it is further declared therein that "this section shall not apply to entries made or initiated prior to the approval of this act." This is, however, not the only provision of the amendatory act authorizing or recognizing assignments of desert land entries, because section five of these added sections also plainly contemplates that assignments may be made of desert land entries during the period allowed for the reclamation and improvement of the lands embraced therein. It is therein provided:

> That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improve-

ments upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following:

Section six gives to claimants the option to perfect, under the act of 1877 alone, claims lawfully initiated thereunder, *or* to perfect such claims and receive patent therefor "under the provisions of said act as amended by this act, so far as applicable." Reading these sections together, the provisions of sections five and six upon the one hand, and of section seven on the other, bearing upon the subject of assignment, are not necessarily in conflict. They should be allowed to stand together and be given full effect, in the administration thereof, according to the language used therein, respectively, unless found to be clearly inharmonious and irreconcilable.

Without section seven the preceding amendatory sections of the act of 1891 would undoubtedly be held to contain sufficient authority for assignments thereafter, notwithstanding the entry was made or initiated previously, provided it was perfected under that act instead of the act of 1877 alone. Would it not be a violent construction to hold that after recognizing, and in effect approving, such assignments in sections five and six, Congress intended in section seven to forbid them except in cases where the entry was made subsequent to March 3, 1891? Section seven contains several provisions in addition to that relative to assignments, and it does not follow that in declaring, generally, that these shall not apply to entries already made or initiated, that it was the intention of Congress to infringe upon or limit in any way the provisions of the preceding sections applicable to such entries. The prohibitive words are confined, in terms, to the provisions of that section and, it is believed, do not reach or control, by necessary implication, the provisions of the preceding sections relative to assignments.

The entry in this case was made prior to the enactment of these sections, but the assignment was made and the steps necessary to the perfection of the entry were taken subsequently, and under the provisions of the amendatory sections. The assignment and the proofs are therefore to be considered under these provisions, and not alone under those of the prior act. Under these circumstances the Department is of the opinion that the assignment to Wallace was a lawful and valid act, and that the integrity of the entry is in no wise impaired thereby. The decision of your office is affirmed accordingly.

INDIAN LANDS—TIMBER CUTTING.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
August 26, 1898.

*Logging Regulations to govern logging by Indians on the ceded Chippewa Reservations, Minnesota, under the provisions of the act of Congress approved June 7, 1897 (Public No. 3).**

1st. The Indians on the ceded Chippewa Reservations, Minnesota, shall be authorized to enter into a contract or contracts with any responsible person or persons to cut and bank any specified quantity of dead timber standing or fallen on said reservations, at a given price per thousand feet, such responsible person or persons being required to give bond in a sufficient penalty, stipulating for the faithful performance of the obligations of such contract, the careful observance of the intercourse laws, etc.

2nd. There shall be designated from the corps of Chippewa examiners, appointed under the act of January 14, 1889 (25 Stat., 642), for the effectual carrying out of these regulations, a superintendent and as many assistant superintendents as the Commissioner of the General Land Office may select. The superintendent designated for the purpose of directing logging operations, shall, with the assistance of the Indian agent at White Earth agency, require each Indian desiring to cut and bank saw-logs, to make a selection of the dead timber standing or fallen, and thereafter make application to be allowed to contract for the cutting and banking of such timber, describing by section, township and range the land on which the dead timber is standing or fallen.

As the dead and down timber is logged from each subdivision of land on which it may be found, said designated examiners shall make the examination thereof under the direction of the chief examiner and the regulations governing them, for the purpose of ascertaining on which of said lots or tracts there is standing or growing pine timber, and shall make their minutes, notes and reports as heretofore.

3rd. Before any timber shall be cut under the foregoing authority, a contract shall be entered into between the Indian applicant or applicants and some responsible person or persons as provided in paragraph one, and in such form as shall be prescribed by the Commissioner of the General Land Office, which contract, however, shall not be of force until the same is approved by the Indian agent and superintendent, and confirmed by the Commissioner of the General Land Office, which approval and confirmation shall operate as a permit for the cutting and banking of the timber applied for by the Indian or Indians.

4th. It shall be the duty of the superintendent and assistant superintendents to go into the woods with the loggers, and direct their

*As amended under Secretary's approval of September 20, 1898.

labors, to the end that no green or growing timber may be cut, and that no live trees may be damaged in any manner, so as to cause them to die, and also to inspect the scaling of the logs.

5th. The superintendent shall receive, in addition to his compensation as examiner of Chippewa lands, one dollar and fifty cents per day for such time as his services may be actually necessary in logging operations hereunder, and his actual and necessary traveling expenses, and the assistant superintendents shall receive, in addition to their salaries as examiners of Chippewa lands, their actual and necessary traveling expenses; and such additional compensation and traveling expenses shall be paid from the proceeds of the sale of logs. Such additional compensation and expenses are in consideration of the added duties of said persons. The assistant superintendents shall oversee and direct such portions of the work as the superintendent may direct.

6th. With the exception of the superintendent, assistant superintendents and scaler, and in cases where persons of sufficient knowledge and skill for foremen, blacksmiths, filers, teamsters, clerks and cooks cannot be found among the Indians, no white labor shall be employed in performing this work, until all available Indian labor shall have been employed.

7th. One-half of the cost of scaling shall be paid by the Indian loggers, and one-half by the purchaser of the logs. After the scaling is completed, the sale of the logs shall not be valid until the same is approved by the Indian agent and superintendent and confirmed by the Commissioner of the General Land Office.

8th. The Indian agent will assume control of the proceeds of the sale, of which two dollars per thousand feet for white pine and one dollar per thousand feet for Norway shall be deducted by him for the benefit of the Indians, and to pay all expenses of the sale, such as advertising, telegraphing, additional compensation of superintendent and traveling expenses of superintendent and assistant superintendents, provided that, in any case where the logs are sold for an amount exceeding six dollars per thousand feet for white pine and five dollars per thousand feet for Norway, the amount to be deducted for the benefit of the Indians, as above stated, shall be proportionately increased in the discretion of the Commissioner of the General Land Office.

The net proceeds remaining shall be divided and paid as follows:

1st. He shall pay the scalers of such logs the amount due on the part of the Indian logger.

2nd. He shall pay the laborers of the logger, including foremen, blacksmiths, teamsters, filers, clerks and cooks any unpaid balance which may be due them under their contract for labor performed in the cutting or delivery or banking of such logs.

3rd. He shall pay the party or parties furnishing the advances under the contract authorized in section 9 to the logger who delivered said logs.

4th. He shall pay to the logger or contractor who banked such logs, any part remaining of the amount to be paid under his contract.

9th. Any logging Indian, on a proper showing of his inability to furnish his logging outfit, or to sustain himself or his family, during the logging operations, may receive advances of goods or cash from any party with whom he may contract, which contract shall first be approved by the Indian agent to such limit as the Indian agent may fix, and such advances shall be paid by the Indian agent to the party making the same from the amount to which such Indian is entitled for his logging work.

10th. The Commissioner of the General Land Office shall have power to prescribe such rules and regulations not inconsistent with these regulations as he may deem proper from time to time, for the more efficient prosecution of the logging operations, and to thoroughly protect the interests of the Indians and the Government in the premises.

F. W. MONDELL,
Acting Commissioner.

Approved,
C. N. BLISS,
Secretary.

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On the commutation of a homestead entry of Sioux Indian lands, restored to the public domain under the act of March 2, 1889, the entryman must pay the minimum price of the land, in addition to the payments required under said act, and this is true whether said lands are situated in South Dakota or Nebraska 395

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*For "ambiguous" in the nineteenth line, page 39, read *unambiguous*.

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